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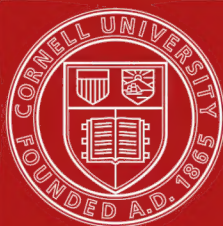
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The law of personal injuries relating to



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THE LAW
OF
PERSONAL INJURIES

RELATING TO
MASTER AND SERVANT

BY
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W. F. BAILEY

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"MASTER'S LIABILITY FOR INJURIES TO SERVANT"

IN TWO VOLUMES
VOLUME I

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PREFACE.

The subject of the present work has become one of the most important of the law. Its consideration is attended with more than ordinary difficulties, by reason of its comparatively recent development. Unlike other branches of the law it is not controlled by traditions or customs of ancient common law, but rather by a common law peculiar to itself, emanating almost solely from expressions of courts and judges. It may not be inaptly termed an independent branch of the law. Courts of particular jurisdictions have felt free to express their own inclinations in formulating particular rules, rather than to be governed by rules or precedents established in other jurisdictions. As a result we have to-day most varied, distracting and inconsistent theories and rules in different states, rendering it absolutely necessary on the part of the practitioner that he acquaint himself with the established doctrine as declared in each. This, even with the utmost study and research, is not easily accomplished. Courts unrestrained are apt to make inconsistent law. The information derived from the ordinary digests and indexes is not often complete or satisfactory; and text-books ordinarily treat the subject in such a general manner, merely stating abstract propositions, that all that is required is not gained from such source. The reports of decisions have become so numerous that a critical examina-

tion of the reported cases is impracticable. Lawyers fully realize that much labor and time has been fruitlessly expended in the effort to obtain from reports that which they did not contain, as well as in the effort to find that which was expressed, but by reason of imperfect indexing was obscured. To know the law is of supreme importance; to be able to point to where it has been authoritatively expressed is of almost equal importance.

The purpose of the present work is chiefly to obviate the difficulty of fruitless search for the expression of the law, and to so collect, condense and classify it that the lawyer may always have it at hand in convenient form for immediate reference.

Definite propositions declared by the courts to be inherent in the general subject have been extracted and stated, and the cases arranged with reference to such propositions. Practically all the cases decided by courts of last resort have been critically read and examined, and from their text has been taken and concisely stated the important facts, the result, and the reasons given for the conclusion of the court. But few lawyers know the extent and variety of the rules and propositions that have been declared to be involved in the consideration of the subject, much less the almost innumerable exceptions which the courts have found it convenient to make. These propositions are stated in the Table of Contents, and those directly involved in each general subdivision are again stated at the head of each chapter. By a careful persual of these propositions a thorough knowledge of all the general rules will be obtained in a comparatively short time. Were the same information sought from other sources it would require years of

careful research to obtain it. The arrangement and classification — placing decisions of different courts under definite propositions — bring them together in contrast, whereby imperfections and inconsistencies, if any such there be, are suggested, and if there are exceptional features in some they can be readily distinguished.

The index is a most important feature of the work. Not only have the legal propositions and the subjects involved to which the former have been applied been properly and suggestively indexed, but such subjects also are stated with cross-references. Hence, if there is present a case involving a set-screw, an uncovered cog, an unblocked frog or other appliance, a reference to the index under the heading of such appliance will disclose where it was involved, as well as the particular rule or doctrine of the law which was applied in each instance.

The index also contains a complete table of fellow-servants, showing when particular employees have been held vice-principals and when fellow-servants. The relation being so diverse under the rules declared in different states, this feature of the work will certainly be appreciated by courts and lawyers alike.

Much space is devoted to the decisions under the Massachusetts co-employee statute. There seems to be a disposition to define the relations of master and employee, and consequently the master's liability where the employee is injured, by direct legislative enactment, a number of states having recently enacted laws which supersede the decisions of their courts in respect to this subject. The Massachusetts statute being in many essential features a reproduction of the English co-employee act, and having been since its enactment a

prolific source of litigation, during which its several provisions have been quite thoroughly construed, a reason was found, in that its precedents might prove valuable elsewhere as well as in that state, for incorporating all of the decisions of its courts giving construction to such law.

This work is not intended in any manner to supplant the work on Master's Liability. That work was designed as a treatise upon that branch of the law, discussing, and to a certain extent explaining, the general doctrine and the declarations of judges. This has an entirely different purpose. It merely seeks to give the expressions of the courts, and properly arrange them. The writer's views are not expressed. The two should properly go hand in hand. The former publication will prove a valuable aid to the latter. It will be of assistance in the attempt to extract from apparently conflicting decisions the most just and reasonable doctrine, as well as an aid in applying correct principles to original propositions.

W. F. BAILEY.

EAU CLAIRE, WIS.,

March 22, 1897.

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PERSONAL INJURY CASES

CONDENSED AND CLASSIFIED.

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I. CHARACTER AND KIND.

A. *What the Term Includes*.

1. The term “appliances” includes machinery, apparatus, premises and the servants employed to do the work.¹

2. **Car stakes.**—It was held that temporary stakes put in a flat-car by a shipper of lumber, to whom the car had been furnished by a railroad company, were the necessary appliances forming part of the car; and where such as were used were defective and insufficient, and by reason thereof injury was caused to an employee of such company, it was held that it was the duty of the company to have exercised proper care in knowing that suitable and proper stakes were used; that this duty was not excused by the existence of a custom delegating it to shippers.²

3. **Horses.**—It was said that the rule as to the master’s duty applied equally to animate and inanimate appliances, and was applied where the agents of a corporation furnished for a servant’s use a horse which was vicious.³

4. Where it was alleged that the defendant promised his servant he would furnish him a gentle team to peddle ranges, but in fact he furnished him a team that was vicious, by reason of which he was injured, it was held the complaint stated a cause of action.⁴

¹Johnson v. Ashland Water-works Co., 71 Wis. 553.

²Bushby v. N. Y., L. E. & W. R. Co., 107 N. Y. 374.

³George H. Hammond Co. v. Johnson, 38 Neb. 244, 56 N. W. 967.

⁴Martin v. Wrought Iron Range Co. (Tex. App.), 23 S. W. 387.

5. Lodging for servant.—A complaint was held good upon demurrer which alleged a failure to supply proper lodging, whereby the employee was exposed to cold and thereby was rendered sick.¹

6. Machinery, arrangement of.—The duty of the master extends to machinery constructed, arranged or set up in such a manner as to be sufficiently safe; and where a machine was so improperly arranged that the belt was likely to move, when the machine was at rest, from the loose pulley to a fixed one, and thereby cause the machine to start, it was held there was failure of duty on the part of the master.²

7. Machinery, parts of.—The obligation of a master to see that a machine on which his servant is set to work is in a safe condition and suitable for the purpose it is used, applies to all its parts. If some of its parts, by reason of its construction, require frequent replacement, such parts, when adjusted in the machine, become as much a part of it as if included in its original construction, and a defect in one of such parts is a defect in the machine. This rule applied to a defective punch in a machine.³

8. Ordinary tools—Rule.—The rule rendering a master liable for defective machinery is not extended to a case of injury to an employee in a service not requiring great skill, arising from the use of ordinary tools known to be defective.⁴

9. It was said, we cannot hold, for such in our opinion is not the law, that an employer is liable to a servant when he furnishes him with an ax, a wagon, a saw, a hammer, or any other tool which appears to be first class, and which subsequently, by some latent defect, breaks and injures the servant. If such were the law, every farmer, contractor or other employer would be liable to his employee when he furnished him tools and they broke and injured him on account of

¹ *Clifford v. Denver, S. P. & P. R. Co.*, 9 Colo. 333, 12 Pac. 219.

² *Donahue v. Drown*, 154 Mass. 21; *Mooney v. Conn. Riv. Lbr. Co.*, 154 Mass. 407.

³ *Toy v. United States Cartridge Co.*, 159 Mass. 313.

⁴ *Marsh v. Chickering*, 101 N. Y. 396; *Cahill v. Hilton*, 106 N. Y. 512; *Corcoran v. Mil. Gas Light Co.*, 81 Wis. 191.

some latent defects which could not be ascertained by the exercise of ordinary care.¹

10. Blocks.—Where the blocks of wood necessary for doing certain work can be picked up at any time around the workshop, the failure of the master to specially furnish them does not render him liable for injuries to an employee caused by their non-use.²

11. Chains.—Where a railroad laborer was injured by the breaking of a chain which the foreman of the gang required the laborers to use, when he knew it was defective, it was held he could not recover from the master, the negligence being that of the foreman, who was a fellow-servant of the laborer.

The ground for the ruling seems to be that, as to such articles with which the employee is brought into actual contact, and where, by handling them, he must necessarily see and know of their condition and report to the employer, the master is not presumed to have better, or even equal, knowledge with his servants, and therefore, if such an implement becomes defective, in the absence of actual notice on the part of the master, he is not liable.

The court say: A different rule would prevail with reference to machinery or perishable articles, which experience teaches require regular inspection, and which are ordinarily presumed to demand repairs and attention.

The court further say: When a master provides a servant with an ax or a pick to be used in the latter's ordinary employment, there would arise no duty on the part of the employer to inspect them, unless after complaint made. To allow a servant to use and handle a chain for days, weeks or months and then hold a master responsible for accidents resulting from wear and tear or breaking, would be harsh law.³

¹Georgia Railroad & Banking Co. v. Nelms, 83 Ga. 70, 9 S. E. 1049. ³Kinney v. Corbin, 132 Pa. St. 341. See De Graff v. Railway Co.,

²Hathaway v. Illinois Central R. Co. (Iowa), 60 N. W. 651. See, also, 76 N. Y. 125; Morton v. Railway Co., 81 Mich. 423, as to brake-chains. Robinson v. Blake Mfg. Co., 143 Mass. 528.

12. Hammers.—A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be an essential part of machinery when it is intended to be, and is operated by means thereof; but when disconnected from any other mechanical appliances and operated singly by muscular strength directly applied, such tool or instrument is not machinery in its most comprehensive signification or in the meaning of the statute.¹

13. An ordinary hammer used for driving spikes was held to be such an appliance as to come within the general rule; and where it appeared that the face of a hammer was brittle, and in its use an employee suffered injury in the loss of an eye, from a fragment breaking from such hammer, it was held the master was liable upon the ground of having furnished an unsafe appliance.²

14. Hand-car.—In the application of the rule of equal knowledge it must often depend on the kind of machinery used—whether intricate or simple in construction. For instance, a gardener could not be held guilty of culpable negligence in furnishing a hoe or shovel to his employee. It does not rest with the servant in such cases to say that the knowledge of the master is superior to his. This was said where a section-man was injured by the breaking of the rod which communicated the power to the hand-car. It was held the hand-car was a simple piece of machinery and he had equal means of knowing its condition.³

15. Ladders.—An ordinary ladder is not such an appliance as to come within the general rule.⁴

16. Lantern.—In an action by a brakeman against a railroad company to recover for injuries received in coupling cars at night, where the proximate cause of the injury was

¹Georgia Pac. R. Co. v. Brooks, 84 Ala. 138, 4 So. 289; Georgia Railroad & Banking Co. v. Nelms, 83 Ga. 70, 9 S. E. 1049.

²Johnson v. Missouri Pacific R. Co., 96 Mo. 340.

³Burlington, etc. R. Co. v. Liehe, 17 Colo. 280, 29 Pac. 175.

⁴Corcoran v. Mil. Gas Light Co., 81 Wis. 191; Marsh v. Chickering, 101 N. Y. 396; Cahill v. Hilton et al., 106 N. Y. 512. *Contra*, Steinhauser v. Spraul, 114 Mo. 551.

the failure of the company to furnish such employee a suitable lantern, the fact that the engineer was guilty of negligence which contributed in part to the injury, in failing to obey a stop signal, was held not to bar a recovery.¹

17. Maul.—Where the employee was injured while using a maul alleged to be defective in this — that it had a cracked and crooked handle, was badly worn and battered, and was uneven on the surface, and when such employee struck a blow with it, it glanced and rebounded in such a way as to cause him to lose his balance on the top bent of a bridge upon which he was working,—it was held that the question of defendant's negligence in furnishing him a defective tool and its knowledge of such defects were properly submitted to the jury, and that a verdict for the plaintiff could not be disturbed.²

18. Pole or stick used as temporary axle for moving car wheels.—Where the negligence claimed was the failure to furnish an ordinary pole or stick as a temporary axle for moving locomotive wheels in a shop, whereby an employee was injured by being knocked down by a wheel which he was assisting to move, it was held that such an instrument was not machinery or such an appliance which a failure to furnish would constitute negligence. It was said it was the duty of employees to furnish such a thing, and without doubt many such could have been found within easy reach.³

19. Ropes.—A rope connected with a tackle-block was held to be such an appliance as came within the rule of the master's personal duty.⁴

20. A rope which a foreman selected from a quantity on hand for use in hauling a barge from the water was held to be within the term "appliance."⁵

21. Ship's rigging.—The general rule which governs the master in respect to the character and condition of the

¹ Atchison, T. & S. F. R. Co. v. Lannigan (Kan.), 42 Pac. 343.

² Chicago, K. & W. R. Co. v. Blevins, 46 Kan. 370, 26 Pac. 637.

³ Potter v. Chicago, R. I. & P. R. Co., 46 Ia. 399.

⁴ Telander v. Sunlin, 44 Fed. 564.

⁵ Lund v. Hersey Lbr. Co., 41 Fed. 202.

appliances he should furnish for the use of his employees extends to and includes the rigging of a ship, and the seamen who are employed therein or in connection therewith.¹

22. Turn-tables.—The construction and maintenance of turn-tables and switches are equally within the duty of the master as the construction of the main line. They are essential to its operation, and without them, or efficient substitute for them, the road could not be used; and he must use reasonable care to keep them in a fit and safe condition. The court makes a distinction between staging and temporary appliances, and structures which are to some extent permanent in character.²

B. Construction of Appliances.

1. Adjustment of Appliances.

23. Rule.—The duty of the master to see to it that the machinery furnished for the use of his servants is reasonably safe does not extend so far as to require him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of their use, and with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of the machine. The rule applied to the manner in which a saw was adjusted upon a table.³

24. In cases where, by the contract of employment, express or implied, the employees are to adjust the appliances by which the work is to be done, the employer is only bound to furnish proper material from which to construct such appliances, and is not bound to see that they are properly constructed or adjusted, and is not liable to a servant for the negligence of a fellow-servant in making such adjustment. The rule was applied to isolated and detached pieces of machinery, and appliances of a stevedore, put together for the

¹ Thompson v. Herman et al., 47 Wis. 602; The Norway v. Jensen, 52 Ill. 373.

² Elmer v. Locke, 135 Mass. 575.

³ Eicheler v. Hanggi et al., 40 Minn. 268.

purpose of loading a particular ship. It was said it was not an entire or permanent appliance.¹

25. Where a device used in unloading vessels, consisting of parts tied together, became dangerous by reason of the negligent and unskilful manner in which they were tied by the servants who in common with others were engaged in unloading a vessel, and an employee was injured while using it, it was held that as the negligence consisted in the manner of adjusting the appliance, it being otherwise perfect of the kind, in common use, the negligence was that of a co-employee of the injured servant.²

26. Where an employee was injured from the fall of a derrick which was caused by the pulling up of the post to which the guy ropes were fastened, it was held that such fastening was not a part of the appliance itself — that such means of fastening, though directed by the superintendent, was the act of a fellow-servant.³

27. In the construction of a windmill and water tank the framework of the mill fell by reason of a post insecurely set in the ground giving way, to which was fastened a rope used in hoisting the framework. It was held that the whole apparatus used for hoisting could not be considered a single machine which the defendant was bound to furnish adjusted and in position to do the work, but the placing and adjustment of the detached appliances was a part of the work to be done. The injury which an employee sustained by the falling of the framework was therefore not caused by any failure to furnish proper and safe appliances, but by the negligence of the foreman in the management of such appliances.⁴

¹ *Burns v. Sennett & Miller*, 99 Cal. 363.

² *McCampbell v. Cunard S. Co.*, 144 N. Y. 552. See, also, *Hogan v. Smith*, 125 N. Y. 774; *Hudson v. Ocean Steamship Co.*, 110 N. Y. 625; *Cregan v. Marston*, 126 N. Y. 568;

Filbert v. D. & H. C. Co., 121 N. Y. 207; *Hussey v. Coger*, 112 N. Y. 614.

³ *McGinty v. Athol Reservoir Co.*, 155 Mass. 183. See, also, *Howard v. Hood*, 155 Mass. 391.

⁴ *Peschel v. C., M. & St. P. R. Co.*, 62 Wis. 338.

2. Unfinished, including Roads.

28. While the general rule is applicable to railroads in a state of completion, it is subject to qualifications as to roads out of repair while in process of being reconstructed. Hence an employee engaged upon a construction train used in repairing such a road was held to have assumed the risk of injury from its defective condition.¹

29. Where an employee with others was engaged in the construction of a railroad bed, and the fill was made by the use of a trestle upon which cars were run and dumped, which was extended by the employees as the work required, and such employee was injured by a portion of the trestle giving way from imperfect bracing, it was held that such trestle was not a structure furnished by the defendants for their employees to work upon, but was of itself a part of the construction of the road, and a part of the work which such employees were required to perform.²

30. The judgment of the lower court having been affirmed in the foregoing case, the plaintiff, having been nonsuited at the trial, brought a new action in the federal court. The court say: Whether such trestle was a structure the building of which might be committed to ordinary fellow-laborers need not be discussed; and proceed to decide the case upon a rule stated to be that of the federal court, that the foreman was not a fellow-servant but a vice-principal, and any negligence on his part in directing or supervising the work was chargeable to the master. The rule of the Minnesota court would constitute such a foreman a fellow-servant.³

31. Where a civil engineer in defendant's employ in charge of laying track on a new line of road was injured while passing over the road on his way to the front of operations, by the derailment of the train, and the claim

¹Brick v. N. Y. & P. R. R. Co., 98 N. Y. 211; Walling v. Construction Co., 41 S. C. 388.

²Lindvall v. Woods et al., 41 Minn. 212, 42 N. W. 1020.

³Woods et al. v. Lindvall, 48 Fed. 62 (C. C. A.).

was that the accident was due to the unsettled condition of the road-bed, it being soft and spongy, no ditches having yet been constructed to drain the water, and also to the high rate of speed at which the train was being run, it was held that the plaintiff's right to recover could not be defeated on the ground that he had assumed the risks and hazards of riding over a new track to aid in the construction of the road. It was said that when the defendant undertook to operate trains upon the track and to carry its employees thereon, it assumed the duty of exercising reasonable care for their protection, having in view the condition of the track; whether such care was exercised was properly a question for the jury.¹

3. Staging.

32. A staging or scaffolding erected for workmen is not a place in which their work is to be done, within the meaning of the rule requiring the master to furnish his servant a suitably safe place in which to do his work. It is an appliance or instrumentality by means of which the work is to be done.²

33. If the employer directs his workmen to do certain work, leaving it to them to provide the structures and appliances required for its prosecution, he may be responsible only for care in selection of the men and material assigned for it. But if he simply employs men under his direction, giving them no charge or responsibility in regard to the result to be accomplished or appliances to be used, the responsibility remains with him. When the preparation of the appliances is neither intrusted to nor assumed by fellow-servants, the master may be guilty of negligence, if defective appliances are furnished, even though the workmen are engaged in their preparation. This was said in reference

¹ *Meloy v. C. & N. W. R. Co.*, 77 Donough, 102 Cal. 575; *Conner v. Iowa*, 744, 37 N. W. 335. *P. F. P. Const. Co.*, 29 Fed. 639.

² *Butler v. Townsend*, 126 N. Y. Compare *Noyes v. Wood*, 102 Cal. 105. *Contra*, *McNamara v. Mac* 389.

to an insecure scaffold not built under the personal supervision of the master, but as to which he exercised a general superintendence and directed what material should be used.¹

34. Where the master does not undertake the duty of furnishing or adapting the appliances by which the work is to be performed, but this duty is intrusted to or assumed by the workmen themselves, within the scope of their employment, he is exempt from responsibility if suitable materials are furnished and suitable workmen are employed by him, even if they negligently do what they undertake. Hence it was held a laborer could not recover against his employer for injuries resulting from the fall of a staging upon him, although it was insufficiently constructed, where the employer furnished suitable materials therefor and committed the duty of building it to laborers, who were skilled workmen, and who were such laborer's fellow-servants.²

35. Where a master had employed a competent scaffold-builder to construct for the use of his employees a scaffold, and it broke from the defective manner in which it was constructed, causing injury to one of the master's servants, it was held that, in the absence of notice of the defect, the master was not liable; that he had performed his duty in the employment of a competent person as an independent contractor to do the work.³

36. In such a case he is at liberty to accept the scaffold without inspection.⁴

37. Where an employer had furnished suitable materials, and had employed competent carpenters to construct a scaffolding to be used by them in putting the cornice upon a

¹ *Arkeson v. Dennison*, 117 Mass. 533; *Mulchey v. Methodist, etc. Society*, 125 Mass. 487; *Bradbury* 407.

² *Kelley v. Norcross*, 121 Mass. 508. In support of the general rule, see *Colton v. Richards*, 123 Mass. 484; *Killea v. Faxon et al.*, 125 Mass. 485; *Clark v. Soule*, 137 Mass. 380; *McKinnon v. Norcross*, 148 Mass. 105; *et al. v. Goodwin*, 108 Ind. 286; *Benn v. Null*, 65 Ia. 407. See, also, FELLOW-SERVANT; MASSACHUSETTS.

³ *Devlin v. Smith*, 89 N. Y. 470.

⁴ *Butler v. Townsend*, 126 N. Y. 105.

building, and the same scaffolding was subsequently used by painters hired to paint the cornice, and while being so used by them it broke, injuring one of them, it was held that the master was not liable; that his duty had been performed in selecting proper materials and the employment of competent servants.¹

38. Where, in building a staging to be used to aid in the erection of an iron bridge, a piece of material was selected from a mass of such furnished by the master, by a fellow-workman, which was insufficient from being knotty, and broke from such cause, whereby a workman was injured, it was held that the master was not liable. That it was not his duty to supervise the selection of every stick from the mass he had furnished. This was the duty of the servants. He had performed his duty when he had furnished an abundance of materials from which his servants could select what was needed.²

39. A highway commissioner with authority employed a master builder to furnish labor and tools required in the erection of a building. The city paid him and the men employed by him for their services and furnished all the materials to be used. Such builder directed one of the men employed by him to erect a staging for the purpose of being used to shingle the roof, and to use therefor certain brackets which belonged to the builder for the support of the staging. One of the brackets being defective broke, and the staging upon which another employee was working fell, causing him injury. It was held that such builder was not the agent of the city in the matter of furnishing the brackets; that the negligence which the evidence tended to prove was that of servants in constructing an unsafe staging, and not that of the master in not furnishing proper material.³

40. Where an experienced carpenter was injured by the breaking of a scaffold plank on which he was working, and

¹Hoar v. Merritt, 62 Mich. 386,
29 N. W. 15.

³Hoppin v. City of Worcester,
140 Mass. 222.

²Ross v. Walker, 139 Pa. St. 42.

it appeared the plank was put in place by a fellow-workman, or by direction of a mere foreman without discretionary power, it was held in an action against the master that the direction of a verdict for the defendant was not error.¹

41. An employee injured by the manner in which a temporary staging was constructed or placed by another servant, upon which the former was to work, where the materials were sound, was held to have no ground for recovery either under the statute or at common law. The cause of the accident was the placing of one of the barrels used for supporting the planks upon some rubbish or chips which caused the planks to tip.²

42. Where a mason-tender, who was employed to tend the defendant's son, engaged in building a chimney, was injured by the fall of the staging, which the son had improperly constructed, the father having furnished an abundant supply of proper material, it was held there was no ground for recovery from the latter.³

43. Where an insecure scaffold was constructed under the direction of defendant's foreman, and injury was occasioned a workman thereby, it was held that the master was not personally liable. That as it was usual for such class of workmen (painters) to build their own scaffolds, who have a choice of means, and one could have been built that was safe, the neglect was that of fellow-workmen.⁴

44. Where a carpenter was injured from a defect in a scaffold which he had constructed according to his own judgment from proper and suitable materials, it was held that a nonsuit should have been granted.⁵

45. Where a scaffold gave way from the imperfect manner in which the braces were nailed, injuring one of the employees who had assisted in its construction, it was held no

¹ *Dewey v. Parke-Davis Co.*, 76 Mich. 631, 43 N. W. 644.

⁴ *Noyes v. Wood*, 102 Cal. 389.

⁵ *Peffer v. Cutter*, 83 Wis. 281.

² *O'Connor v. Neal*, 153 Mass. 281. See, also, *Blazinski v. Perkins*, 77

³ *Kennedy v. Spring*, 160 Mass. Wis. 9.

recovery could be had against the master. It was said there are cases in which the servants employed construct as a part of their work such place and appliances, using part of the work done by them as a means of doing the remainder. Such a case is that of carpenters working upon a building, and who, as part of their work, construct scaffolds for themselves to stand upon in doing their principal work. Where such is the case, those engaged together in the entire work are fellow-servants, not only in doing the main work, but also the incidental or preparatory work by means of which they do the main work.¹

46. Where injury to an employee was occasioned by the breaking of an unsound board in a scaffold which he had assisted in constructing, where the selection of the material was left to one of his fellow-workmen, it was held that the negligence was that of his co-employee.²

47. **Exceptions.**—It was assumed by the court that a scaffold erected to be used in the construction of a building was a place of work, and within the rule applicable to the duty of an employer towards his servant as to its condition and safety in respect to premises. Hence it was held that a person who was employed to take charge of the erection of such scaffold was in the performance of a duty personal to the master, and having selected imperfect materials, whereby it broke and injury resulted to an employee, the employer was liable.³

48. Where an employee was injured by the fall of a scaffold, the rule was recognized that if the injury was caused by the negligent act of any of the other men employed as laborers or bricklayers upon the building, they being co-employees, their negligence was a risk assumed; but the exception was stated that if the defendants, as contractors, were present and superintended the defective scaffold as to mate-

¹ *Marsh v. Herman et al.*, 47 Minn. 537, 50 N. W. 611. See, also, *Fraser v. Lumber Co.*, 45 Minn. 235, 47 N. W. 785.

² *Willis v. Oregon Ry. & Nav. Co.*, 11 Oreg. 257, 4 Pac. 121.

³ *Haworth v. Seevers Mfg. Co.*, 87 Ia. 765, 51 N. W. 68.

rial and manner of construction, and personally directed the employee to use it, then the rule of co-employees was not applicable. It then became the defendant's personal negligence.¹

49. Defendants selected one of their employees to superintend the construction of a scaffold or runway to be used in connection with unloading coal from vessels to bins upon their dock. He had entire charge of the work and of the selection, from such as the defendants furnished, of the materials necessary and proper for the purpose. The scaffold broke by reason of the use of defective materials. The superintendent did not select the materials himself, but delegated that duty to other employees. It was held that he was a vice-principal as to the work; that the fact that the materials were selected by other employees did not relieve the master from liability to one whose duties were in the use of the scaffold and who was injured by reason of its defective construction.²

50. An employee was injured by the falling of a span of a bridge which was being erected, its fall being occasioned by the insufficiency in amount and quality of the bracings and false work used, and the failure to furnish proper and sufficient materials, and the removal of supports and bracings which had been furnished, to make the structure safe and secure during its construction. It was held that such employee could recover from the master on the ground of his negligence; that those having supervision of the work represented the master in the performance of a personal duty.³

51. Where an employee was injured by reason of the defective manner in which a scaffold was built or fastened to poles that supported it, and it appeared that such scaffold was built by the defendant's superintendent or under his direction, it was held that the defendant was liable.⁴

¹Stevens et al. v. Howe, 28 Neb. 547, 44 N. W. 865.

²Brown v. Gilchrist et al., 80 Mich. 56, 45 N. W. 82.

³Brothers v. Cartter et al., 52 Mo. 372.

⁴Whalen v. Centenary Church, etc., 62 Mo. 326.

52. The general rule as stated by the Massachusetts court was in this case approved by the court, but it refused to apply it to false work and a temporary bridge over which trains moved while the permanent structure was being built. They applied a rule in substance that if the master undertakes to furnish structures to be used by the servant in performance of his work, he must use due care in their erection. Such duty is personal to the master.¹

53. Where the foreman directed an employee to use a defective staging, of which defect the foreman was aware, and injury resulted therefrom to such employee, it was held that the defendant was liable, and this though the employee may have known of the defect, but did not appreciate the danger.²

54. Where it was alleged that an employee was injured by the breaking of a board used as a step to a lumber pile, it was held upon demurrer that the complaint in alleging such fact in connection with the averment that the defendant caused the pile of lumber to be constructed, and provided such means for ascending, stated a cause of action against him; that notwithstanding the temporary character of the structure, and that the rule applicable thereto was that applicable to defective ladders or scaffolds, the allegations were sufficient to charge personal neglect on the part of the defendant.³

55. Upon an appeal from a trial upon the merits, where it appeared that the workmen selected the material for use as steps from the mass furnished, of which there was an abundance of proper and sound material, it was held that the negligence was that of a fellow-servant in selecting unfit material.⁴

¹ Bowen v. C., B. & K. C. R. Co.,
95 Mo. 268.

² Sullivan v. H. & St. J. R. Co.,
107 Mo. 66, 17 S. W. 748.

³ Fraser v. Red River Lumber Co.,
42 Minn. 520.

⁴ Fraser v. Red River Lumber Co.,
45 Minn. 235.

C. Character of.

1. Master Not Required to Furnish the Safest or Best.

56. Rule.— Every manufacturer has the right to choose the machinery to be used in his business, and to conduct that business in a manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel or occupy an old or new house, as he pleases. The employee having knowledge of the circumstances, and entering his service for the stipulated reward, cannot complain of the peculiar tastes and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service.

An employee having knowledge cannot claim indemnity except under peculiar circumstances. He is not secretly or involuntarily exposed, and likewise is paid for the exact position and hazard he assumes, and so he may terminate his employment when from unforeseen perils his reward is inadequate or unsatisfactory.

This was said where a boy ten years of age was injured by his hand getting caught in the uncovered gearing of a spinning frame in a mill. It was in the same condition as when he entered the service. The contention was that the master was negligent in not having the gearing covered.¹

57. The employer is not bound to furnish for his workmen the safest machinery, nor provide the best material for its operation. If the machinery be of an ordinary character, and such as can with reasonable care be used without danger, it is all his duty requires. It is sufficient if reasonably safe.²

¹ *Hayden v. Smithville Mfg. Co.*, 443; *Payne v. Ruse*, 100 Pa. St. 301; 29 Conn. 548. *Hickey v. Taaffe*, 105 N. Y. 26;

² *C., R. I. & P. R. Co. v. Loner-* *Stringham v. Hilton*, 111 N. Y. 188;
gan, 118 Ill. 41, 7 N. E. 55; *L. S. & Burke v. Witherbee*, 98 N. Y. 562;
M. S. R. Co. v. McCormick, 74 Ind. *Henry v. Staten Island R. Co.*, 81

58. He is simply required to furnish such as are reasonably safe and to see that there are no defects in those which his employees must use. The test is not whether the master has omitted to do something he could have done, but whether, in selecting tools and machinery for the servant's use, he was reasonably prudent and careful, and whether those provided were in fact adequate and proper for the use to which they were applied.¹

59. Such as a prudent man would furnish if his own life were exposed to the danger that would result from unsafe or unsuitable appliances.²

60. Such as a reasonably prudent person would ordinarily have used under similar circumstances.³

61. In considering an instruction which stated that the employer's duty required him to furnish such appliances as combine the greatest safety with practical use, after determining that such was not the law, and recognizing the distinction that the master's duty was not the same to its employees as to others in respect to the character of his appliances, the court said: The master's duty is the exercise of reasonable care only. It is not sufficient to show that there are better or safer ones to be had, but it must be shown that the one supplied had some radical fault, or that its use had become so generally obsolete or supplanted by others of a superior character that its adoption or retention would itself

N. Y. 373; *Camp Point Mfg. Co. v. Me. 397; Sisco v. L. & H. R. R. Co.*, 145 N. Y. 296.

Ballou, Adm'r, 71 Ill. 417; *Whitwam v. Wis. & Minn. R. Co.*, 58 Wis. 408; *Rummill, Adm'r, v. Dilworth*, 111 Pa. St. 343; *Lehigh Coal Co. v. Hayes*, 128 Pa. St. 294; *Fort Wayne, L. & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Botsford v. Mich. Cent. R. Co.*, 33 Mich. 256; *Mich. Cent. R. Co. v. Smithson*, 45 Mich. 212; *McGinnis v. Can. So. Bridge Co.*, 119 Mich. 466, 13 N. W. 819; *Carter v. Oliver Oil Co.*, 34 S. C. 211; *Wormell v. Maine Central R. Co.*, 79

¹ *Stringham v. Hilton*, 111 N. Y. 188; *Burke v. Witherbee*, 98 N. Y. 562; *Marsh v. Chickering*, 101 N. Y. 396; *Hewitt v. Flint & P. M. R. Co.*, 67 Mich. 61.

² *Burke v. Witherbee*, 98 N. Y. 562; *Marsh v. Chickering*, 101 N. Y. 396.

³ *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262. See, also, *La Sure v. Graniteville Mfg. Co.*, 18 S. C. 275; *Ex parte Johnson*, 19 S. C. 492.

indicate negligence. The master is not bound to adopt every latest improvement in machinery, nor is he liable for an accident which would not have occurred if such improvements had been adopted. If at the time of its selection the appliance in question was the only one in general use, or was the one which was generally used, and was reasonably adapted to the purpose for which it was employed, its selection or retention would not of itself indicate negligence, nor would the fact that better ones were used by others, or that later devices had overcome defects which experience had shown this one possessed, be proof of negligence in the continuance of its use. It is a well-settled rule that when an appliance has been in daily use for a long time, and has uniformly proved safe and efficient, its use may be continued without the imputation of imprudence or carelessness.

The facts were that a street-car driver was injured by reason of the pin attaching the single tree to the draw-head of the car, working out of the hole, he being drawn over the dashboard. It was claimed there were other devices that would have prevented the injury if used.¹

62. Where men are hired, something must be predicated of their judgment and prudence, and hence when the employer furnishes them with tools and appliances which, though not the best possible, may by ordinary care be used without danger, he has discharged his duty, and is not responsible for accidents.²

63. An employer does his duty when he provides his employees in such manner as is fairly and reasonably prudent and safe — what he fairly and reasonably deems prudent and safe would extend the rule; yet in *Sykes v. Packer*, 99 Pa. St. 465, the latter proposition was stated to be the rule.³

64. Where the question was as to the better appliance — an eyebolt or hook — for the attachment of a brake, it was

¹ *Sappenfield v. Main Street, etc. R. Co.*, 91 Cal. 48. *Haish*, 110 Pa. St. 575; *Friel v. Citizens' Ry. Co.*, 115 Mo. 503.

² *Pittsburg, etc. R. Co. v. Sentmeyer*, 92 Pa. St. 276; *Payne v. Ruse*, 100 Pa. St. 301; *Shaffer v.* ³ *McCombs v. Pittsburg & W. R. Co.*, 130 Pa. St. 182.

said this question is immaterial, as both seem to be approved appliances, tested by trial and experience; and if it was conceded that the eyebolt has superior merits, it by no means follows that the defendant was bound to discard the hook that had been used for a long time and on so many cars without accident. A master is not bound to change his machinery to apply every new invention or supposed improvement in appliances, and he may even have in use a machine or an appliance for its operation shown to be less safe than another in general use, without being liable to his servant for the consequences of the use of it. If the servant thinks proper to operate such machine, it is at his own risk, and all that he can require is that he shall not be deceived as to the degree of danger he incurs.¹

65. Cars without ladders.—The rule was stated that the master was not obliged to furnish the best or safest appliances or adopt the latest improvements; but it was said that if a ladder on the end of a car is better calculated to insure safety than a mere smooth surface without any means of ascending the car to apply the brakes, then they should be provided; if the car was wanting in the appliances reasonably necessary for the safety of employees at the time of its construction, and so continued when put and used upon the road, it would not be necessary to show any further knowledge on the part of the defendant in order to fix its liability.²

66. Device for picking up cable.—Where a gripman upon a motor car was injured while attempting to pick up the cable which had dropped from his grip, and the charge was that the appliance which he used for this purpose was not as safe as some other kind, it was held that, as the device was perfect of its kind, the mere fact that there might be other kinds more safe was immaterial.³

¹ *Wonder v. Balt. & Ohio R. Co.*, 32 Md. 411.

³ *Friel v. Citizens' R. Co.*, 115 Mo. 503.

² *Greenleaf v. Illinois Central R. Co.*, 29 Iowa, 14.

67. Machinery; adjustment of.—The rule was applied to the arrangement of machines and adjustment of belts thereon used in making barbed wire. It appeared that, unless care was used in removing the belt from the fast to the loose pulley, the belt, on account of its being somewhat loose, would attach to the fast pulley and thus start the machine, but would not do so if caution were used. It was held the appliance was not defective.¹

68. Machine planing.—It was said the general rule is that an employee who enters upon the service knowing the kind of instrument or machine that he is to work with or about, assumes the risks incident thereto, and that his employer discharges his full duty in that behalf if he furnish and maintain a good instrument or machine of the particular kind, even though some other kind would entail less risk. This was said in reference to a planing machine which an employee was oiling when injured, the claim being that it could have been made more safe.²

69. Mail cranes.—The general rule was applied where it was alleged that there was a safer kind in use which worked automatically, and that it was placed too near the track. There was no evidence that it was placed nearer the track than cranes on other roads, or that it was practicable to place one at a greater distance and have it answer the purpose. It was held there was no evidence authorizing the submission of the questions to the jury.³

2. General Use the Test.

70. Rule.—The master is bound to use appliances which are not defective in construction, but as between him and his employees he is not bound to use such as are of the best or most improved description. If they are such as are in general use, that is all that can be required.⁴

¹ Shaffer v. Haish, 110 Pa. St. 575.

³ Sisco v. L. & H. R. R. Co., 145

² Arkadelphia Lbr. Co. v. Bethea, N. Y. 296.

57 Ark. 76, 20 S. W. 808; Railway
Co. v. Davis, 54 Ark. 389.

⁴ Smith v. St. L., K. C. & N. R.
Co., 69 Mo. 32; Ship Building

71. The master is not a guarantor of the safety of his machinery and is only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and has a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe. He is not bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. He is, however, bound to use all reasonable care and prudence for the safety of those in his service by providing them with machinery reasonably safe and suitable for use.

This language was applied where an employee was injured in the attempt to place a belt upon a pulley while the machine was in motion. The defect complained of was the absence of a loose pulley. However, as the fact of general use of such machinery was controverted, the case upon this point is without value except as to the expression of the general doctrine.¹

72. All that is required of a railroad company is that it construct and equip its tracks and cars, and station its agents in the manner usual with well-managed railroads, and as good railroading requires.²

73. The employer is bound to furnish machinery and appliances that are of an ordinary character and of reasonable safety, and the former is the conclusive test of the latter. Whatever is according to the general, usual and ordinary course adopted by those in the same business is reasonably safe, within the meaning of the law. Hence where there are several methods in general use (in this case of unhitch-

Works v. Nuttall, 119 Pa. St. 149; Augerstein v. Jones, 139 Pa. St. 183; Simpson v. Locomotive Works, 139 Pa. St. 245; Northern Pac. R. Co. v. Blake, 63 Fed. 45 (C. C. A.).
 Hewitt v. Flint & P. M. R. Co., 67 Mich. 61; Lehigh, etc. Coal Co. v. Hayes et al., 128 Pa. St. 294; Henry v. Staten Island R. Co., 81 N. Y. 373; Muirhead v. H. & St. J. R. Co., 103 Mo. 251; Tabler v. H. & St. J. R. Co., 93 Mo. 79; Goodnow v. Walpole Emery Mills, 146 Mass. 261;
¹ Washington, etc. R. Co. v. McDade, 135 U. S. 554.
² Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

ing a dump-car), the choice being a matter of judgment, depending upon the surrounding conditions, the owner has an absolute discretion to select according to his own judgment. The necessary control of his own business demands that this right shall be strictly maintained.¹

74. The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of the methods or machinery in general use in the business.²

74a. The master's duty does not require him to provide appliances similar in kind to those that are in use in other establishments, even though they may be less dangerous than those in use by him, but merely to furnish appliances which are proper and suitable, and this is to be determined by its actual condition, and not by comparing them with appliances used by other establishments for similar work.³

74b. The master's duty was expressed to be the exercise of ordinary care in furnishing such appliances as have been found safe and are ordinarily used by others in the same business.⁴

75. The employer does not undertake with the employee that he will use the very best appliances, nor is he called upon to discard machinery adopted by him in his business, reasonably suited therefor, though there may be other machinery that may be safer; still less is the master to be cast in damages for error of judgment in selecting one method of prosecuting his business, or one kind of machinery or appliance, on proof that another method or appliance is better or safer, when both methods or kinds of appliances are in common use.⁵

75a. Where, in constructing a bridge, a temporary track for moving timbers was made of thick plank, the thin ends being wedged, such being a usual and customary method,

¹ *Kehler v. Schwenk*, 144 Pa. St. 348.

² *Reese v. Hershey*, 163 Pa. St. 253.

³ *Wood v. Heiges* (Md.), 34 Atl. 872.

⁴ *Gulf, C. & S. F. R. Co. v. Warner* (Tex. App.), 36 S. W. 118.

⁵ *Sisco v. Lehigh H. R. R. Co.*, 145 N. Y. 296. See, also, *Frace v. N. Y., L. E. & W. R. Co.*, 143 N. Y. 182.

and while timbers were being thus moved, one of such wedges worked out, which was not an unusual occurrence, causing a plank to tip and fall, knocking one of the workmen off the bridge, causing him injury, it was held that no negligence appeared on the part of the company.¹

76. Cars.—The general rule was applied to the use of cars placed at the rear end of trains where flagmen are stationed, which have doors in the end and are without platform or railing. A flagman was injured while uncoupling a pushing engine, caused by the engine at the head of the train taking up the slack, thus producing a sudden jerk, which threw the flagman from the train.²

77. The duty on the part of a railroad company is the exercise of reasonable care and diligence in furnishing for the use of its employees safe and sufficient cars and machinery which is most common and usual in the business of railroad companies.³

78. From the fact that a particular method or appliance is dangerous, it does not follow that it is negligence for an employer to use it. Some employments are essentially hazardous, and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. An employer performs his duty when he furnishes appliances of an ordinary character and of reasonable safety. For, in regard to the style of the implement or the nature of the mode of doing the work, "reasonably safe" means safe according to the habits and ordinary risks of the business.

This was said in reference to the use by a railroad company of broad-gauge cars upon narrow-gauge trucks.⁴

79. The rule was applied to the use of a wrecking-car and the method in which it was operated and drawn in a train. It was said proof that another machine was safer, or that

¹ Bedford Belt Ry. Co. v. Brown, 142 Ind. 659. Barber, 5 Ohio St. 541; Railroad Co. v. Webb, 12 Ohio St. 486.

² Davis v. Balt. & Ohio R. Co., 152 Pa. St. 314. ⁴ Titus v. Railroad Co., 136 Pa. St. 618. See, also, Ford v. Ander-

³ Mad River & L. E. R. Co. v. son, 139 Pa. St. 261.

other means or manner of using it was safer, was not evidence of negligence.¹

80. The rule was applied where the failure of a railroad company to securely fasten the ends of a car, which were on hinges, so as to allow the car to be used as a flat-car by dropping the ends inward, was charged as negligence, an employee having suffered injury in attempting to mount the car, using such end as a support.²

81. Brakes on.—Where it appeared that the brakes on a dirt-car, although not the best in use, were such as were in common use on dirt-cars, and they had been inspected and put in order a short time before the accident, it was held there was no evidence of a breach of duty on the part of the master.³

82. Bumpers and couplings.—Where it appeared from the evidence that the cars and coupling apparatus were such as had always been in use by the defendant corporation and by other corporations in the state, it was said that negligence could not be predicated upon the claim that they were insufficient and not the best known.⁴

83. It is the duty of railroads to keep themselves reasonably abreast with improved methods, so as to lessen the danger attendant on the service, and while they are not required to adopt every new invention, it is their duty to adopt such as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances. There have been such advancements in science for the control of steam, and improvements in the machinery and appliances used by railroads for the better security of life, limb and property, that it would be inexcusable to continue the use of old methods, machinery and appliances known to be attended with more or less danger, when the

¹ *Muirhead v. H. & St. J. R. Co.*, 19 Mo. App. 634. Affirmed in 103 Mo. 251. ³ *Henry v. Staten Island R. Co.*, 81 N. Y. 573.

² *Graham v. C., St. P. & M. R. Co.*, 62 Fed. 896 (C. C. A.). ⁴ *Osborn v. Knox & Lincoln*, 68 Me. 49.

danger could be reasonably avoided by the adoption of the newer, and those which are in general used by well-regulated railroads. Not that they are required to adopt every new invention useful in the business, although it may serve to lessen danger, but it is their duty to discontinue old methods which are insecure and to adopt such improvements and advancements as are in ordinary use by prudently conducted roads, engaged in like business and surrounded by like circumstances.

This was said where the question was as to the kind of bumpers and draw-heads used; and in applying the rule to the facts it was further said: If the draw-heads and bumpers used by the defendant were such as were employed by many well-conducted roads, this would repel all imputation of negligence founded on their mere structure, although other roads, or even a majority of them, adopted a different pattern.¹

84. Chock on a vessel.—It was said in reference to an appliance upon a vessel, if it was fastened in the manner and mode that was usual and customary with other vessels of like character, and in a mode fully approved by competent judges and by previous experience, then there was no negligence or fault on the part of the owner.²

85. Guards to machines.—Where a boy seventeen years old was injured while working at a candy-rolling machine, and it appeared that his employer had removed therefrom, temporarily, a safety-guard of his own invention, with which plaintiff had been accustomed to work the machine, it was held that the defendant should have been permitted to show that the same kind of machines were used without guards in another factory where the boy had previously worked, and that defendant's safety-guard was not in general use.³

¹ *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276; *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764; *Railway Co. v. Allen*, 78 Ala. 494.

² *The Lizzie Frank*, 31 Fed. 477.

³ *Reese v. Hershey*, 163 Pa. St.

86. The rule was applied where the injury occurred in the use of a shaping machine which the evidence showed was complete without a guard, and was generally so used, but could be and was sometimes provided with a guard or fender as security against the negligence of workmen or possible accidents.¹

87. Also where it was charged that it was negligence not to provide a spreader to a rip-saw.²

88. Hand-cars.—Where the crank of a hand-car was so constructed that the end of a bolt projected through, and an employee was injured by means of his clothing adhering to the thread on the end of the bolt, it was said that negligence could not be predicated upon the ground that other cranks had the thread covered by nuts or the end welded and were therefore less dangerous, in the absence of proof that the one used was not a well-known device.³

89. Paint, character of.—For injuries suffered by a servant from the use of defective materials when engaged in a work and in a place not in any sense dangerous, the materials being those for a long time in common use for the purpose to which they were applied and the work done under the direction of a competent supervisor, the master is not liable. So held in reference to the character of paint furnished employees to use in painting the inside of a water tank, which, from some cause not anticipated, exploded, injuring the workmen engaged in its use. It was said that the master was not obliged to subject such material to an analysis to determine the hazard in its use.⁴

90. Rails.—Where it appeared that the use of a V rail for guards to railroad switches would be safer for employees than the use of a T rail and would answer the purpose of

¹ Cagney v. H. & St. J. R. Co., 69 Mo. 32.

² Ship Building Works v. Nuttall, 119 Pa. St. 149. For other cases relating to guards, covering of gearing, blocking frogs, and providing

safety appliances, see SAFEGUARDS AND PRECAUTIONS.

³ Carey v. Boston & Maine R. Co., 158 Mass. 228.

⁴ Allison Mfg. Co. v. McCormick, 118 Pa. St. 519.

the company equally as well, yet as the latter was in general use, it was held that the defendant could not be held negligent in its use.¹

91. Set-screws.— It was said, in reference to a set-screw upon a revolving shaft, that it cannot be claimed it was out of repair or defective or unsuitable for the purpose. So long as set-screws are in common use, though also a recess collar was in common use, upon which there was less liability of being caught than on the other, it cannot be held that the employer is negligent in the use of the former.²

92. Switches.— Where a ground switch of a form in common use was placed in a yard, in a space six feet wide between the tracks, the lock of the switch being placed in the middle of the space and the handle lying flat, extended to within a foot of the adjacent rail, and it could be safely and effectively worked by standing in the middle opposite the lock, using reasonable care, and a brakeman, while using the switch was injured by an engine on the other track, it was held that the fact of the location of the switch was not proof of negligence in its construction or arrangement. It was said that the switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been.³

93. Where an employee was injured while operating a slab-saw, and the negligence charged was the failure of the employer to provide some guard or protection which would prevent a plank forced over the dead rollers from coming in contact with the saw, it was said that, unless it was shown that some such safeguard is usually and customarily employed by those engaged in similar business and under like circumstances, there was no proof of failure of duty by the master in omitting to employ it here. It is error to sub-

¹ *Smith v. St. L., R. C. & N. R. Co., Heeling Mach. Co.*, 65 Fed. 940 69 Mo. 32. (C. C. A.). See ASSUMED RISK; SET-

² *Goodnow v. Walpole Emery* SCREWS.
³ *Randall v. Balt. & Ohio R. Co.*,
Mills, 146 Mass. 261; *Hale v. Cheney*, 159 Mass. 268; *Keats v. National* 109 U. S. 478.

mit to a jury the question whether the master should have employed the device, in the absence of sufficient evidence of general usage; for jurors are not at liberty to charge a duty upon the master according to their own notions of what was proper under the circumstances, nor upon the opinion of experts of what was desirable and prudent; but they should determine the question of dereliction in duty by the master by the customary observance of those in like business, or as the thought was well expressed in *Titus v. Railway Co.*, 134 Pa. St. 618: "Jurors must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall in effect dictate the customs or control the business of the community."

The testimony of the plaintiff below was wholly insufficient to establish a general usage. It shows that in some few mills some sort of contrivance is used when the saw is in line with the rollers.

It was held that a verdict should have been directed for the defendant below.¹

3. New Inventions.

94. Rule.—The master's duty does not require that he shall adopt such appliances as combine the latest devices or improvements, but such only as are reasonably safe and in common use.²

95. Where injury to an employee was caused by the breaking of a coupling pin, and it was urged that the defendant should have provided cars with the Potter drawbar, which is more safe, having two couplings instead of one, it was said that the evidence fails to show that the Potter draw iron is in general use, or that the center coupling pin is not ordinarily sufficient for the purposes intended. The defendant was not required to adopt every or any new

¹Mississippi River Logging Co. v. Schneider, Circuit Court of Appeals, Seventh Circuit, January Session, 1896; 74 Fed. 195.

²Philadelphia & Reading R. Co. v. Hughes, 119 Pa. St. 301. See Faber v. Carlisle Mfg. Co., 126 Pa. St. 387.

device until its utility had been sufficiently tested, and it appeared as a whole better than the appliance in use.¹

96. Neither companies nor individuals are bound to discard and throw away their implements upon the discovery of every new invention which may be thought or claimed to be better than those they have in use.²

97. The cause of injury to an employee was claimed to be the absence of a device upon an electric car, termed a resistance coil, which, where used, tends to graduate the motion in starting the car; and the negligence alleged was the failure to provide such upon the car in question. It appeared that later the company did place it, generally, upon their cars, and it did not appear how recent the invention came into use. It was held that it was error to submit the question of defendant's negligence to the jury. It was said: A sufficient reason for this conclusion is that there was no proof that at the time of the accident the resistance coil had even been invented or discovered, and certainly none that it had become to be so known, approved and recognized as a useful device in connection with such motors that the defendant is to be charged with negligence in not having adopted it.³

98. There is no obligation on the part of the master to furnish absolutely safe appliances, nor is a railroad bound to adopt every new invention, though it be an actual improvement. It is not required to discard its implements and machinery because better have come into use; but it is the duty of the company to use reasonable care and precaution in keeping its appliances in good condition and order, and cannot wholly disregard the improvements of the day.⁴

4. The Master Not an Insurer.

99. **Rule.**—The employer is only liable where he fails to employ reasonably skilled workmen or suitable implements

¹ *Burns v. Chicago, M. & St. P. R. Co.*, 69 Iowa, 450.

³ *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391, 51 N. W. 125.

² *L. S. & M. S. R. Co. v. McCormick*, 74 Ind. 440.

⁴ *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440.

and machinery, properly constructed for the use intended, and of proper materials. He is not an insurer that the servants he employs are skilful and prudent, or that the workmanship or materials employed in the construction of implements or machinery are absolutely proper and suitable.¹

100. As between master and servant there is no implied warranty as to the fitness and soundness of the machinery furnished for use. The master's duty is to exercise diligence, to furnish safe appliances, and he owes no duty beyond that.²

101. While an employer is bound to exercise due care and diligence in furnishing for the use of his employees fit and safe implements and machinery, he is not a guarantor of their safety, and in an action by an employee for neglect to perform this duty the *onus* is on the plaintiff to show negligence.³

102. Although the liability of the master to his employees is not that of a guarantor of the absolute safety or perfection of his machinery or other apparatus provided for their use, he is bound to exercise the care which the exigencies reasonably require in furnishing such as is adequate and suitable.⁴

103. Boilers.—Where an engineer was killed by the explosion of the boiler of a locomotive, and it appeared the boiler was made of the best material and by first-class manufacturers, and it had not been used long enough to create any suspicion of its unsafe condition, and the defect was not

¹ Richardson v. Cooper, 88 Ill. Ind. 445; Porter v. H. & St. J. R. 270; Ind., B. & W. R. Co. v. Toy, Co., 71 Mo. 66.
² C., C. & I. R. Co. v. Troesch, 68 Adm'x, 91 Ill. 474; Chicago & N. W. Ill. 545; Chicago & Alton R. Co. v. R. Co. v. Sweet, 45 Ill. 194; Pittsburg, C. & St. L. R. Co. v. Adams, Platt, 89 Ill. 141.
³ Painton v. North Cent. R. Co., 105 Ind. 151; Pennsylvania Co. v. 83 N. Y. 7.
⁴ Hough v. Railway Co., 100 U. S. Whitcomb, 111 Ind. 212; The Jenny Electric Light & Power Co. v. 213.
 Murphy, 115 Ind. 566; Cincinnati, I., St. L. & C. R. Co. v. Roesch, 126

of such a character as could have been discovered by any of the tests applied for the purpose, and its appearance did not indicate its unsafe condition, it was held that it did not appear that the company had omitted any duty and therefore it was not liable.¹

104. Where it was shown that the iron used in the construction of a boiler was of the kind usually employed; that it had been subjected to and withstood the usual tests, and had been used by experienced persons with prudence and skill, the *prima facie* evidence created by the fact of an explosion is overcome, and the inference must be drawn that the explosion occurred from some latent defect not detected by the usual and proper tests.²

105. Wooden handles to hand-car.—The Missouri court, while recognizing the rule as stated, held that negligence on the part of the master was properly found, where he furnished handles to a hand-car made of brash and brittle wood, which broke soon after being put in use, thereby injuring a section-hand. The ground was that the master was chargeable for the act of workmen selected by him, who made the handle, in their selection of improper material for the purpose.³

5. Sufficient for the Purpose.

106. Rule.—The master's obligation is not to supply the servant with absolutely safe machinery, but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger. When a master employs a servant to do a particular kind of work, with particular kind of implements and machinery, the master does not agree that the implements and machinery are

¹Ind., B. & W. R. Co. v. Toy, Adm'x, 91 Ill. 474.

²Illinois Cent. R. Co. v. Phillips, 49 Ill. 234. The mere fact of an explosion does not *prima facie* establish negligence as between mas-

ter and servant. See EVIDENCE; ACCIDENT AS PROOF OF NEGLIGENCE.

³Siela v. H. & St. J. R. Co., 82 Mo. 430. See, also, Covey v. H. & St. J. R. Co., 86 Mo. 635.

free from dangers in their use, but he agrees that such implements and machinery are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements and machinery with care and prudence; and if under such circumstances harm or injury come to the servant, it must be ranked among the accidents the risk of which the servant must be deemed to have assumed when he entered the service. What was said in *Railway Co. v. Vilarius*, 56 Ind. 511, as to the master's duty to furnish the best appliances, disapproved.¹

107. If an appliance is fit and sufficient for use in the manner in which the master allows it to be used, its insufficiency for other service at other times is immaterial. A machine may be safe for one use when it is not for another. Thus, a track which is used only for a special purpose may be fit for such use while not fit for general use.²

108. A master is under no obligation to his servant to make machinery suitable for a purpose not designed or which was not contemplated by him, and is not liable for an injury to a servant from the machinery while used for his own purposes. The duty of the master in respect to his machinery relates to that upon which the servant is employed to work, and not to that with which the servant's employment has no connection, unless incidental to the service in which he is engaged.

This was said where a servant was injured by hanging a towel on the end of a revolving shaft merely for his own convenience.³

¹ Lake Shore & M. S. R. Co. v. O'Donnell v. D., S. S. & A. R. Co., McCormick, 74 Ind. 440. 89 Mich. 174; Hewitt v. Flint & P.

² Stetler v. C. & N. W. R. Co., 46 M. R. Co., 67 Mich. 61; Ragon v. Wis. 497; Durgin v. Munson, 9 Toledo, A. A. & N. M. R. Co., 97 Allen, 396; Preston v. C. & N. W. Mich. 265, 56 N. W. 612.

R. Co., 98 Mich. 128; Batterson v. ³ Kauffman v. Maier, 94 Cal. 269. C. & G. T. R. Co., 53 Mich. 127; Citing Felch v. Allen, 98 Mass. 572.

109. It was held error to charge that the master's duty required him to furnish his employees with good material and suitable appliances, since this may be understood to mean safe and perfect material and appliances.¹

110. New York rule.—The New York court have formulated a rule that when an appliance or machine, not obviously defective or dangerous, has been in daily use for a long time and has uniformly proved adequate, safe and convenient, its use may be continued without an imputation of negligence or carelessness.²

111. It was claimed that a gang-plank used for unloading freight cars was defective because there were no hooks or spikes to hold it in place. Similar ones had been in use for fifteen years. It was said: It cannot be stated as matter of law that it was negligence to use such a tool. The defendant was using an appliance which experience had shown to be safe; the law did not require it to do more.³

112. This rule was applied where a hook used to connect a cable with a car, in some manner, while hauling ore from a mine, became displaced. It had served its purpose for more than a year without accident, and there was nothing to suggest that it was not suitable and safe for the purpose. It was said that it is a mistake for one to take his stand after an accident and to impute responsibility from a view thus obtained. It is nearly always easy, after an accident has happened, to see how it could have been avoided.⁴

113. Where the negligence claimed was that the sill of a switch-stand extended over an embankment, and a brakeman was injured by his clothes being caught while attempting to mount a car, and it did not appear that it had, during its five years in use, caused other accident or that it was

¹ *Gulf, W. T. & P. R. Co. v. Abbott* (Tex. App.), 24 S. W. 299.

³ *La Pierre v. C. & G. T. R. Co.*, 99 Mich. 212, 58 N. W. 60.

² *Stringham v. Hilton*, 111 N. Y. 188; *Burke v. Witherbee et al.*, 98 N. Y. 562.

⁴ *Burke v. Witherbee et al.*, 98 N. Y. 562.

dangerous, it was held that a verdict for defendant was properly directed.¹

114. Where an appliance used for lowering a bucket in a mine proved ineffective in the particular instance, and the rule stated by the New York court was urged as applicable, it was said that the fact that no person had previously been hurt in descending the shaft was entitled to much weight, but it was not conclusive of the defendant's due care, especially in view of the evidence tending to show that the original efficiency of the brake had become impaired.²

115. Where, however, an employee who had no previous connection with operating an appliance used for handling railroad iron in a mill was called to assist, and one of the appliances was so constructed by means of hooks and rings that in operating a crane it was disturbed, and the hook thrown out of the ring, causing the appliance to fall, thus injuring such workman, it was held that the manner of securing and connecting such appliance was in fact unsafe, and it was liable any day to become detached by a blow from the crane. To the argument that it had hung in the same manner for years without accident, and therefore the employer might rest upon the assurance that it was safe, it was said: But this circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods.³

116. Where a nut on a shaft worked loose, and it appeared that it should have been so fastened that the friction would tighten it, it was held the appliance was unsuitable and was defective, of which defect the master was chargeable with knowledge. To the argument that if it had been in use for several years and proved safe, negligence could not be imputed in continuing its use, it was said: It had been dangerous all the time.⁴

¹ *Bivins v. Georgia Pac. R. Co.* (Ala.), 11 So. 68.

² *Myers v. Hudson Iron Co.*, 150 Mass. 125.

³ *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190.

⁴ *Columbia & P. S. R. Co. v. Hawthorne*, 3 Wash. Ter. 353, 19 Pac. 25.

117. Anchorage.—An employer was held liable for the manner in which he constructed an anchorage at the head of a stairway, to be used in moving a heavy safe, an employee being injured by its giving way. His liability, however, was placed upon the ground that where an employer takes personal supervision of the work and provides defective or insufficient structures or appliances to be used in its accomplishment, he is liable to an employee who, without fault, sustains an injury by reason of the defective appliance.¹

117a. Cage in a mine.—An employee in a mine was injured while being hoisted from the mine, caused by placing his fingers in a space between a nut on a bolt and the cage, and as the cage started his finger was pressed and crushed. It was held there was no ground for recovery. It was said if the cage was properly constructed and properly used and was sufficient for the purpose intended, there was no occasion for the employee to place his hand in the position in which he did.²

118. Cars.—Where a brakeman upon a gravel train, who left it temporarily for his own purposes, attempted to board it while it was going at an unsafe rate of speed for such an effort, and, catching hold of the rim of the gravel box of one of the cars, it broke from defective material, whereby he fell and was injured, it was said: This was a gravel train, constructed, of course, with reference to the objects and purposes to hold gravel, and this purpose the car might very well answer, though it might be very unsafe to trust their rims as a ladder by which to mount the train while in motion. The duty of the defendant to construct the boxes and their rims with special reference to such purpose does not appear.³

119. Where it was claimed injury was caused to a brakeman by the failure to provide a regular caboose car, and

¹Bradbury v. Goodwin, 108 Ind. 286.

³Timmons v. Central Ohio R. Co., 6 Ohio St. 105.

²Jayne v. Sebewaing Coal Co. (Mich.), 65 N. W. 971.

there was evidence that the car used was suitable for the purpose, it was held that it could not be inferred from the mere fact that there was difference in the manner of construction of the two kinds that the one used was unsuitable.¹

120. Brake beam.—In an action by a brakeman for personal injuries, the evidence disclosed that he was injured by his foot being caught by a brake beam which hung but three inches above the rail; that it was usual for the brake beam to hang six inches above the rail, and, if the one in question had so hung, plaintiff's foot would not have been caught. It was held that there was evidence sufficient to show a defect in the brake beam and to entitle the plaintiff to recover.²

121. The test is not whether one kind is safer than another. It is sufficient that they are reasonably safe and fit for the designed use.

This was said where, temporarily, in the absence of a draw-bar upon a car, a rope was used for coupling cars together in an emergency.³

122. Bumpers.—The law does not impose upon a railway company the duty of using cars with bumpers of the same height; but it does require defendants to use ordinary care to provide bumpers so nearly of the same height that they will accomplish the purpose for which they are intended, and under ordinary circumstances and with proper care will prevent the cars from coming in contact.⁴

123. It was held that the question of negligence on the part of a railway company in the use of cars with bumpers of different height, where injury was caused an experienced employee, was proper for the jury.⁵

124. The advantages possessed by cars with double dead-woods cannot be dispensed with because a little more care

¹Galveston, H. & S. A. R. Co. v. Mo. 79; Muirhead v. H. & St. J. R. Davis (Tex. App.), 23 S. W. 1019. Co., 103 Mo. 251.

²Texas Pac. R. Co. v. White, 82 ⁴Muldowney v. Ill. Cent. R. Co., Tex. 543, 18 S. W. 478. 36 Iowa, 462.

³Tabler v. H. & St. J. R. Co., 93 ⁵Le Clair v. Railway Co., 20 Minn. 1.

must be observed in operating them, and a railway company, in view of the fact of their general use, is not guilty of negligence in using them upon their line of road.¹

125. It was said in reference to the use of cars with double dead-woods: The generally accepted doctrine is that a railway company is not bound to use upon all the cars in its possession the safest possible appliances or those of the latest and most approved pattern. It is at liberty to use such appliances as are in use at the time by other well-managed roads, and such as are regarded by competent railroad men as ordinarily safe and fit to be used.²

125a. Check chains.—Where a king-bolt, which fastened the couplings between an engine and tender, broke and the safety chains parted, causing a separation of the engine from the tender, and it appeared that the safety chains were not used for the purpose of holding the engine and tender together, it was held that it was not error to refuse to submit to the jury the question of the sufficiency of the chains.³

126. Couplings and draw-bars.—The mere fact that there was some evidence that a coupling pin was too tight for removal at the proper moment was held sufficient to permit a jury to find the defendant negligent, on the ground of a want of proper care in furnishing a safe and suitable appliance.⁴

126a. A switchman attempted to couple cars by the use of a pin found on the dead-wood of one of the cars, which pin was too large, and, failing to force it into place, the cars came together, causing his injury. It was held that, finding the pin in such place, he was justified in presuming it was suitable for use on that car, and the defendant was chargeable with negligence in leaving it there.⁵

¹ Indianapolis, B. & W. R. Co. v. Flanagan, 77 Ill. 365. See, also, T. W. & W. R. Co. v. Black, 88 Ill. 112; Hathaway v. Mich. Cent. R. Co., 51 Mich. 253, 16 N. W. 634; Northern Pac. R. Co. v. Blake, 63 Fed. 45 (C. C. A.).

² Northern Pac. R. Co. v. Blake, 63 Fed. 45 (C. C. A.).

³ Gardner v. St. Louis & S. F. R. Co. (Mo.), 36 S. W. 214.

⁴ Price v. Richmond, etc. R. Co., 38 S. C. 199.

⁵ Missouri, K. & T. R. Co. v. Hauer (Tex. App.), 33 S. W. 1010.

127. The court assumed that a coupling known as a stiff goose-neck was not commonly used with freight cars, and was not reasonably safe when used with such cars.¹

128. Where a railroad company failed to provide a crooked link with which to couple cars with draw-bars of unequal height, and the conductor ordered a brakeman to use an unsuitable link, and the brakeman was injured, it was held that this was negligence on the part of the master.²

129. The mere fact that the spring which is a part of the appliance or device for holding draw-bars of cars in place had become somewhat weak, permitting the draw-bar to drop below those upon cars of equal height, and which defect was known to the company, does not constitute the appliance so defective as to make it negligence on its part to put the car in use. It could be coupled with care, and it is well known that brakemen are frequently required to couple cars of uneven height.³

130. It was said that a railroad company is not required to have all its cars and locomotives constructed after the same pattern. It may lawfully construct them after different models, and may use different appliances in operating its railroad. The law only requires that such cars, locomotives and appliances shall be reasonably safe for the uses to which they are put. Hence, it was held not negligence *per se* on the part of a railroad company to use upon its road an engine the draw-bar of which was too short to permit one of its cars to be safely coupled to or detached from such engine.⁴

131. Where it was claimed that the draw-bar upon a practically new engine was too short to permit the act of coupling it to cars with safety to employees, it was held to be a question for the jury whether such an engine was suitable for the work designed. It was said: It is the duty of rail-

¹Grannis v. C., St. P. & K. C. R. Co., 81 Iowa. 444.

²Denver, T. & G. R. Co. v. Simpson, 16 Colo. 55, 26 Pac. 339.

³Brewer v. Flint & P. M. R. Co., 56 Mich. 625, 23 N. W. 440.

⁴Whitwam v. Wis. & Minn. R. Co., 58 Wis. 408.

road companies to furnish locomotive engines suitable for the work required, and to exercise ordinary care in the performance of this duty. If such an engine is suitable for the work for which it was designed to be used and was used, the company will not be responsible for the manner in which it was used by the fellow-servants of an employee injured thereby.¹

132. A mail-car which had been used for a long time, the coupling apparatus of which was lower than that upon other cars, which rendered the service of coupling it to others in the train more difficult and even more dangerous, was held to be a suitable appliance and not defective.²

133. It was held that where the draw-bar of a car was so short as to render it dangerous to couple to the engine, this proved it to be an unsuitable and defective appliance.³

134. It was said in reference to short draw-bars and coupling furnished to be used in connection therewith, which were not of a proper kind for the particular use, though proper for use in connecting ordinary draw-bars, that appliances ought not to be so unskilfully constructed that the slightest indiscretion on the part of the operatives would prove fatal.⁴

135. It is not negligence *per se* for a railroad company to adopt a device for coupling cars not before in use upon its road without discarding those already in use by it, although the use of the two together may be more hazardous than would be the use of either alone. It is generally held that a railroad company is not bound to provide the best or most approved appliances, but may use such as are reasonably fit for the purpose or that may be in general use on well-managed railroads. It was held that the fact that the draw-

¹ Lawless v. Conn. Riv. R. Co., 136 Mass. 1.

² Fort Wayne, L. & S. R. Co. v. Gildersleeve, 33 Mich. 133. See, also, Botsford v. Mich. Cent. R. Co., 33 Mich. 256.

³ Belair v. C. & N. W. R. Co., 43 Iowa, 662.

⁴ Toledo, W. & W. R. Co. v. Fredericks, 71 Ill. 274.

heads of two cars that an employee was coupling at the time he was injured were of different patterns — that one was somewhat smaller than the other and required a smaller coupling-link — in the absence of proof that suitable links were not provided, was not negligence; the company had the lawful right to adopt one device without discarding all others differing from it; that this right might be exercised was a risk incidental to the duties in which the plaintiff was engaged, and was assumed by him in entering upon the performance of them.¹

136. It was said, however, that it is the duty of railroad companies to furnish good and well-constructed machinery, adapted to the purpose of its use, and of the kind that is found to be safest when applied to use; and while they are not required to seek and apply every new invention, they must adopt such as is found by experience to combine the greatest safety with practical use. This was said where the claim was that the use of a car having a Miller platform and one having the ordinary coupling device in connection was negligence.

Yet it was further said that the use of the Miller platform upon freight cars was impracticable, and that it did not appear that the use of the Miller platform and the ordinary device together was extrahazardous.²

137. Where an employee claimed that the cause of his injury was the use of an old-style draw-head in connection with a Miller coupling, it was said, whether the defendant was negligent in permitting the use of the two in connection, under the circumstances, was a question for the jury. It is insisted that this conclusion is warranted from what was said in *Railroad Co. v. Cox*, 145 U. S. 593. The decision was rendered by a divided court.³

138. It seems to have been assumed that where a railroad company made use of a freight car upon its road with draw-

¹ *Railroad Co. v. Henly*, 48 Ohio St. 608.

² *Southern Pac. R. Co. v. Burke*, 60 Fed. 704 (C. C. A.).

³ *Toledo, W. & W. R. Co. v. Asbury*, 84 Ill. 430.

bars shorter than those which were on cars owned by the company, where a brakeman was injured while attempting to couple it in a train, that it presented a question for the jury whether the use of such a car was negligence, as well as the question whether under the circumstances the plaintiff assumed the risk from such a car.¹

139. Where a brakeman was injured in the act of coupling an engine to a car, the claim being that the draw-bars were unusually short, leaving a space of about ten inches, where the usual space is from twenty-four to thirty inches, it was held, this fact appearing, it was sufficient to justify a verdict of negligence on the part of the company that was the proximate cause of the injury. It was further held that the plaintiff could not recover by reason of the existence of a rule which required him to take time and examine as to such causes before coupling.²

139a. Hand-holds; absence of.—A car cannot be said to be defective and insufficient because not provided with grab-irons and hand-holds on the end of the car where there are steps for the use of brakemen, constructed so as to answer the same purpose, as well as steps, and such cars are in common use and are sufficient if used with ordinary care.³

140. Derrick.—Where the contention was that the gudgeon pin used in a derrick, though new, was too small, the evidence being conflicting upon this point, it appearing, however, that it was of the kind used by many railroads for similar purposes, it was held the question was proper for the determination of a jury.⁴

7. Different Kinds in Use.

141. Where the contention was as to the relative merits of different kinds of devices for fastening belts, it was said a master is not bound to furnish the best known appliances for the work in which his servant is employed, but only such

¹ Chicago, R. I. & P. R. Co. v. Linney, 59 Fed. 45 (C. C. A.).

³ Dooner v. Delaware & H. Canal Co., 171 Pa. St. 581.

² Bennett v. Northern Pac. R. Co. (Dak.), 49 N. W. 408.

⁴ Richmond & D. R. Co. v. Weems, 97 Ala. 270, 12 So. 186.

as are reasonably fit and safe. He satisfies the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard for his own safety, if selecting them for his individual use.

Where several appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master may not be made liable where, in selecting the appliance which causes an injury to his servant, he took the one which, according to his judgment and that of skilled men in his employ, was the best. It is culpable negligence, not an error of judgment, which imposes the liability.¹

142. Elevator.—Where an employee was injured while using an elevator which was not intended or designed to carry persons, and which was so used by such employee to relieve other employees and himself from the fatigue of going up the stairs, it was held the employer was not liable.²

143. Locomotive engines.—It was originally held in Tennessee (*Nashville, etc. R. Co. v. Elliot*, 1 Cold. 611) that whether the kind of an engine used, an eight-wheeled instead of a four-wheeled, was better adapted for the particular service, was a proper question for a jury, as well as whether its use was negligence. The doctrine was stated that such machinery must be as safe as skill and care could make it.

This broad doctrine was modified in *Nashville, etc. R. Co. v. Jones, Adm'x*, 9 Heisk. 27, and finally the doctrine as originally held and modified was disapproved and the rule stated to be that the master's duty in respect to his appliances was that of the exercise of ordinary care only.³

144. Where a tank was fastened to the framework of a tender with only one bolt, and the design was for the use of two, and as the result of a collision the bolt broke, per-

¹ *Harley v. Buffalo Car Mfg. Co.*, 91 Cal. 48; *Kehler v. Schwenk*, 144 142 N. Y. 31. See, also, *Frace v. Pa. St.* 348.

N. Y., *L. E. & W. R. Co.*, 145 N. Y. ² *Felch v. Allen*, 98 Mass. 572.

296; *Flinn v. Railway Co.*, 142 N. Y. ³ *East Tenn., V. & G. R. Co. v.* 11; *Sappenfield v. Street Ry. Co.*, *Aiken*, 89 Tenn. 245.

mitting the tank to become detached at that point from the frame, it was held that the appliance was not defective, it appearing it had been used safely for a long time and found sufficient for the ordinary purposes for which constructed.¹

145. It was held not negligence *per se* for a railroad company to use in its yard a road-engine instead of what is termed a switch-engine; such an engine, it was said, is safe if prudently used.²

146. Yet it was held that evidence was admissible to show that a switch-engine is more suitable for particular work and more easily handled than a freight-engine.³

147. Where an employee was injured by the moving of an engine upon a turn-table, and the alleged cause was a defective brake, and the trial court had refused to permit the company to show that it had given instructions to block engines at such times, it was held such ruling was error. It was said that the offer went to the extent of showing that the accident was caused by a fellow-servant. That the condition of the engine for the uses and purposes required at the time of the accident was the gist of the action. Its insufficiency for other service at other times did not concern the plaintiff.⁴

148. Machine, form of.—It was said in reference to the form of a machine in which a saw was placed, that it was the duty of the defendant to provide its employees with machinery and appliances suitable for its efficient and reasonably safe performance.⁵

149. Pole used as a lever.—Where an employee was injured by a pole, used as a lever in prying up ties on a track, falling upon him, and the claim was that the pole was not a proper appliance, it was held that it was sufficient for the purpose, and the jury should have been so instructed.⁶

¹ Preston v. C. & N. W. R. Co., 98 Mich. 128, 57 N. W. 31.

⁴ Durgin v. Munson, 9 Allen, 396.

² Fowler v. C. & N. W. R. Co., 61 Wis. 159.

⁵ Atchison, T. & S. F. R. Co. v. McKee, 37 Kan. 592, 15 Pac. 484.

³ Missouri Pac. R. Co. v. Lamothe, 76 Tex. 219, 13 S. W. 194.

⁶ Young v. Virginia & N. C. Const. Co., 109 N. C. 618, 14 S. E. 58.

150. Ropes and cables.—The principle was stated: Where an employer places an employee as foreman in charge of a piece of work requiring several days' labor away from his own factory, and of such a nature as may be reasonably supposed to require the use of appliances for raising and lowering a heavy piece of iron, and fails to furnish such appliances, the foreman has implied authority to provide tackle and blocks by borrowing or otherwise, and if he obtains and uses insufficient ones, whereby a workman under his control, without fault on his part, is injured, the employer is liable.

This was said where an employee was injured by reason of the breaking of a rope which the defendant's foreman had borrowed for the purpose of raising a heavy piece of iron from the ground, in order that dirt and stones which were in the way of its being properly adjusted might be removed. The emergency did not arise which made it necessary to raise the piece of iron until after it had first been put in place.¹

151. It was held that a railroad company was liable for injury occasioned its servant from the use of a cable attached to a dirt-plow upon a gravel train that was insufficient to bear the strain put upon it while unloading cars upon a curve, in the absence of the use of other appliances which the evidence disclosed were essential to be used in connection with the cable to relieve it from an unusual and severe strain. It was said: It is the duty of an employer to furnish suitable implements for the use of his employees in the performance of their duties. An employee has the right to repose confidence in the prudence and caution of his employer, and rely upon the safety and suitability of implements or appliances with or about which he is required to work.²

152. Switches.—A railroad company removed a patent switch and replaced it with what is termed a common

¹Telander v. Sunlin, 44 Fed. 564. See, also, Lund v. Hersey Lbr. Co., 41 Fed. 202. See, however, Robin-
son v. Blake Mfg. Co., 143 Mass. 528; Felch v. Allen, 98 Mass. 572.

²Cincinnati, L., St. L. & C. R. Co. v. Roesch, 126 Ind. 445.

switch. The latter became misplaced, causing derailment of a train and injury to its engineer. It appeared that a train will pass safely over a misplaced patent switch. The reason why the change was made was that a car had been by the force of the wind moved from the side track on to the main track, threatening injury to passengers and employees. It was held there was sufficient reason for changing the switch, and a charge of negligence for so doing could not be sustained.¹

153. Where the defect is in the design of an appliance, the petition must state that the defendant negligently or carelessly adopted it, or continued the use of it after ascertaining its unfitness.²

D. Improper Use of.

See, also, FELLOW-SERVANTS.

154. Rule.—Negligence of the master cannot be predicated upon an improper use of an appliance.³

154a. If suitable and safe appliances are furnished for the use of a foreman and a crew under him for the doing of a particular work, and he fails to use them, or they are negligently or unskilfully employed, the employer is not liable for resulting injury to one of such laborers. If, however, the appliances furnished are insufficient, then the master may be liable.⁴

155. Derrick.—Where an employee was injured by the breaking of a derrick, caused by a timber which was being hoisted by means thereof meeting with some obstacle and extra force was applied to overcome it, it was said, in the absence of proof that it was not properly constructed or of

¹ *Piper, Adm'x, v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 630.

² *Current v. Missouri Pac. R. Co.*, 86 Mo. 62.

³ *Duffy v. Upton et al.*, 113 Mass. 544; *Hussey v. Cogger*, 112 N. Y. 614; *Stringham v. Hilton*, 111 N. Y. 188;

Hart v. Naumburg, 123 N. Y. 641; *Curran v. Merchants' Mfg. Co.*, 130

Mass. 374; *Colyer v. Pennsylvania R. Co.*, 49 N. J. L. 59.

⁴ *Cleveland, C., C. & St. L. R. Co. v. Brown*, 73 Fed. 970.

improper materials, nothing appeared to indicate it was a defective appliance.¹

155a. Where an employee was injured while working in connection with a dirt-plow, and there was provided shives for the cable to work through, and he placed the cable around the stanchion of a car instead of through the shive, which, upon the cable being tightened, gave way, breaking such employee's leg, it was held that no recovery could be had; that his injuries were the result of his using the appliance in an improper manner.²

156. Where it was alleged the guy stays of a derrick used for hoisting stone in a quarry were insufficient (1) by reason of being too weak to bear the strain; (2) by reason of having become rusted at the point of attachment to the derrick proper; and it was urged on the part of the defendant that the cause of their breaking was an attempt to lift a stone that had not been loosened from its bed, it was said that the general rule as to the master's duty in respect to furnishing appliances applies only to the use for which they are intended. If a servant of his own volition apply them to some other use, it is at his own risk and not that of the master. As there was some evidence tending to show that it was customary in such business to use the derrick to ascertain if a stone is loosened, it was a proper question for the jury, if such was the fact, to determine whether the appliance was strong enough to stand the test of reasonable and prudent strain for such a purpose.³

157. Elevator.—It was said where the master furnishes machinery reasonably safe, but which becomes unsafe when negligently used, he cannot be said to have violated his duty, and if a servant is injured because of such negligent use by a co-servant the master is not liable. Hence, where an elevator was constructed in a building in a manner usual

¹Duffy v. Upton et al., 113 Mass. 544.

³Sather v. Ness, 42 Minn. 379, 44 N. W. 128.

²Illinois Cent. R. Co. v. Daniels (Miss.), 19 So. 830.

and was not defective, and injury was occasioned an employee by the act of the engineer in permitting it to ascend until it struck a beam which caused the rope to break, whereby it fell, and it appeared it had been operated without change for two years without accident, it was held that negligence on the part of the master was not shown.¹

158. A defect in the winding of chains supporting an elevator upon the drum, due to the manner in which the elevator was operated and used, was alleged as ground of negligence on the part of the employer. It appeared the elevator was one of the most approved kind and pattern; had been used six years without accident; had been thoroughly inspected three months prior to the accident and found in perfect condition. It was held there was nothing to indicate negligence on the part of the master.²

159. Where the court, on the part of the defendant, was requested to charge that if the elevator was provided with proper appliances and the injury was caused by the elevator being improperly handled by a co-employee, and but for such improper handling the injury could not have happened, then the injury was caused by such employee alone, and such request was denied, it was held error.³

160. Machine, starting of.—Where a boy fifteen years of age, while cleaning machinery in a mill, was injured by the negligence of a fellow-servant in starting the machinery, it was held that his injuries were due to an improper use of the machine, and there was no ground for recovery against the master.⁴

161. Platform.—Where a watchman in a railroad yard in the night-time ran along a platform appropriated for handling freight, in an effort to prevent a collision of cars, and he was injured by contact with trucks left on such platform, it was held he could not recover. It was said: If the

¹Stringham v. Hilton, 111 N. Y. 188.

³Steineke v. Diamond Match Co., 87 Wis. 477, 53 N. W. 842.

²Hart v. Naumburg, 123 N. Y. 641.

⁴Curran v. Merchants' Mfg. Co., 130 Mass. 374.

platform had been set apart or appropriated to such use, it would have been the duty of the company to keep it clear for that purpose. The company were not bound to anticipate that the watchman would use it to run upon in an emergency.¹

162. An employee working upon a vessel was injured by being thrown down the hatchway by contact with a barrel of lime which other employees were loading on the vessel. A judgment in favor of the plaintiff was sustained, not on the ground that the hatchway was left unprotected, but, as stated by the court: "The defendant did owe to deceased lawfully on its vessel the duty of not negligently throwing lime down the hatchway." What principle was involved they do not state. The man was evidently killed by the improper use of a safe appliance by his co-employees. The place where he was at work was intrinsically safe.²

163. Sliding door.— While it was strongly declared that the master's duty extended to seeing that his mechanics who constructed his appliances actually exercised skill and care in doing their work, yet no liability rested upon the master for injuries to a servant caused by the careless handling of the appliances by his fellow-servant.

This was said in reference to a sliding door of a building, which fell causing injury to an employee.³

164. Spout in a mill.— Where a miller employed in a mill stepped upon a spout used to convey grain in process of manufacture from one place to another, it gave way under his weight causing him to fall. It was held that negligence was not shown on the part of the master. It was said it (the spout) did not give way and produce the injury complained of because of any defect in its construction, or because it did not possess the requisite strength to perform the uses for which it was intended and to which it was put.

¹ *Hamilton v. Richmond & D. R. Co.*, 83 Ga. 346, 9 S. E. 670.

³ *Colyer v. Pennsylvania R. Co.*, 49 N. J. L. 59.

² *Davis v. Oceanic Steamship Co.*, 89 Cal. 280.

The defendant was not bound to anticipate that it would be used to bear the weight of employees or serve the office of a ladder or platform.¹

164a. Where an employee was injured while engaged in repairing a machine called a "dryer" in a feed mill, and such machine was originally intended to be heated by steam, but the proprietors for good reasons conceived the idea of heating it with hot water, and such employee was injured by the hot water escaping and scalding him, it was held that it was immaterial, so far as he was concerned, that the machine was contemplated to be heated by steam by the manufacturers. The material question was the manner in which his employer heated the same, and, so long as the machine was perfectly and properly used, the risks he assumed in repairing the same were incident to its use.²

1. Selecting Unfit Implements.

See CONCURRING NEGLIGENCE and PROXIMATE CAUSE; also FELLOW-SERVANT, Massachusetts.

165. In an action for personal injuries plaintiff proved that the employees in defendant's machine shop, when operating lathes to turn crank shafts of a light weight, used anything they saw fit as a counter-balance, and that a piece of iron weighing forty pounds so used, but improperly secured, had blown off and struck the plaintiff, an employee. He also proved that in turning shafts of a heavier weight an appliance particularly designed for a counter-balance was used, but failed to prove such an appliance was used in turning shafts of a lighter weight. It was held that the fault, if any, was that of a fellow-servant in the use of an appliance, and not that of the master in not providing a suitable one.³

166. Where a foreman used blocking consisting of pieces of wood placed one on top of the other as a means, in con-

¹ Schmidt v. Leistikow, 6 Dak. 386, 43 N. W. 820.

³ Faber v. Carlisle Mfg. Co., 126 Pa. St. 387.

² Glover v. Meinrath et al. (Mo.), 34 S. W. 72.

nection with other appliances, in raising a heavy body, and, by reason of the insecure manner in which such blocks were placed, they canted or tipped, and thereby injury was caused to one of the workmen, it was held that negligence could not be imputed to the master in furnishing an improper appliance.¹

167. Where an injury was occasioned a laborer in a foundry who was called upon frequently to assist in running out molds, by the escape of molten metal, due to the use of an imperfect flask in making the mold, and it appeared that numerous flasks were provided, and there was no requirement to use the faulty one, it was held that the master was not liable; that the injury was occasioned by the act of a fellow-servant in selecting an unfit appliance.²

168. Where a machine, which was the cause of an injury to an employee, was not furnished by the master, but was a device created by fellow-workmen for their own convenience, against the use of which the master's superintendent objected and directed that it be not used, it was held the master was not liable. It was said: The master is not liable to a servant who is injured by the careless use of a machine which is not necessarily dangerous if properly used.³

169. It was said: The manner of using foreign cars and its own by a railroad company may be left to competent servants, and, when proper pins for coupling are supplied, the failure to use them properly, or to replace one too short by another, is the fault of such servants.⁴

170. Where a telegraph pole was being raised by a gang of workmen by the aid of a proper hoist, called a deadman, which broke, and the foreman directed the use of a shovel, which was not a proper tool for the purpose, and the pole fell, injuring one of the gang, it was held that he could not

¹ Robinson v. Blake Mfg. Co., 143 Mass. 528.

² Kehoe v. Allen et al., 92 Mich. 464, 52 N. W. 740.

³ Callaway v. Allen, 64 Fed. 297 (C. C. A.).

⁴ Thyng v. Fitchburg R. Co., 156 Mass. 13.

recover from the master, in the absence of proof of neglect on his part to furnish tools within convenient reach.¹

171. Where servants of a common master were employed upon the same work, and one of them, without authority from his employer, directed the other to use a machine for a dangerous and improper purpose, for which it was not intended or provided, and he complied and was injured, it was held there was no principle of law which would make the master responsible.²

172. An employer was held liable for the negligence of his foreman, who was ordered to move a barge from the water, without directions as to means, in selecting from that which the employer had, an unsafe rope which broke and injured an employee assisting in the work.³

173. Where a boy seventeen years old was injured while working with his father, who was a machinist in the defendant's shop, while they were using what is termed a side-set — a tool for cutting iron — by a fragment of iron being thrown from the battered face of such tool when struck by a powerful hammer, and the alleged negligence was the furnishing of a defective tool, and it appeared that there were many that were free from such defect at hand, which they could have selected in place of the defective one, it was said: A master who provides and keeps proper tools for the use of his servants, whose duty it is to select such as they require for their work, is not in general responsible, if a servant voluntarily uses a tool which has become obviously defective and unfit for use, and is injured by reason of such defect.⁴

174. An employer who has always on hand new ropes to put on a derrick used to hoist coal from the hold of a vessel, which any of the employees can get whenever they think

¹ Carroll v. West. Union Tel. Co., 160 Mass. 152.

² Felch v. Allen, 98 Mass. 572.

³ Lund v. Hersey Lbr. Co., 41 Fed. 202.

⁴ Hefferen v. Northern Pacific R. Co., 45 Minn. 471, 48 N. W. 1; Rawley v. Colliau et al., 90 Mich. 31, 51

N. W. 350.

the ones in use to be unsafe, is not responsible for the death of an employee caused by the rope breaking, when it appears that the ropes provided were of the best quality and were entirely safe until frayed by use.¹

174a. Where an employee was injured by the breaking of a rope used in lifting a heavy shaft, it was said there could be no recovery against the master if a supply of ropes were furnished for such purpose, some of which were sufficient, and an unfit one was selected by a fellow-servant, or if the cause of the breaking of the rope was the manner in which it was put upon the shaft, whereby it was cut and weakened.²

E. Safeguards and Precautions.

See APPLIANCES; GENERAL USE; JURORS NOT TO DETERMINE THE KIND.

175. Rule.—The master's duty does not require him to use machines which, in their construction, will guard against accidents as well as others that may be employed, if such as he uses are reasonably safe.³

176. Every manufacturer has a right to choose the machinery to be used in his business and to conduct the business in a manner most agreeable to himself, provided he does not thereby violate the law of the land.⁴

177. Blocking frogs.—It was said: Conceding that the use of blocks decreases the danger to employees, that does not prove negligence of the master in not adopting it. The fact that some roads use it and the defendant uses it in part is not enough to sustain the charge of neglect. It must appear that the old system is condemned and that the unblocked switches are unfit for the purpose for which used.⁵

¹ Cregan v. Marston, 126 N. Y. 568, 27 N. E. 952. 29 Conn. 548; Coombs v. New Bedford Cordage Co., 102 Mass. 572.

² Prescott v. Ball Engine Co. (Pa. St.), 35 Atl. 224. ⁵ Chicago, R. I. & P. R. Co. v. Lonergan, 118 Ill. 41, 7 N. E. 55.

³ Schroeder v. Mich. Car Co., 56 Mich. 132, 22 N. W. 220. See, also, McGinnis v. Can. So. Bridge Co., 49 Mich. 466, 13 N. W.

⁴ Hayden v. Smithville Mfg. Co., 819; Lake Shore & M. S. R. Co. v.

178. Where it appeared that the frogs generally used in the defendant's road were unblocked, though blocked frogs were used in some places, and the weight of the evidence was to the effect that on the great railway systems of the west the unblocked frogs were generally used, the following instruction was approved as being a correct statement of the law:

"The jury are instructed that if they find from the evidence that railroad companies used both the blocked and unblocked frogs, and that it is questionable which is safest or most suitable for the business of the roads, then the use of unblocked frogs is not negligence, and the jury are instructed not to impute the same as negligence to the defendant."¹

179. It was said: The mere fact that frogs were not blocked was not sufficient to establish negligence. Evidence of those of practical knowledge that unprotected frogs and switches are inherently unsafe and dangerous when prudently and carefully worked and managed, and that blocking them materially lessens the danger of their use and management, and that such safeguard was generally recognized by those engaged in operating railroads, would tend to establish the allegation that the continued and persistent use of unprotected switches by a railroad corporation is negligence.²

180. It was held a question for the jury to determine whether the use of an unblocked frog into which the foot of a brakeman was caught was negligence. It was held proper to prove an order, published by the company, requiring all frogs to be blocked, as bearing upon the question of the danger to employees from unblocked frogs.³

181. A statute of Michigan, recently enacted, requires that switches, frogs and guard-rails shall be blocked; neg-

McCormick, 74 Ind. 440; Huhn v. Missouri Pac. R. Co., 92 Mo. 440.

¹ Southern Pac. R. Co. v. Seeley, 152 U. S. 145.

² Missouri Pac. R. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401.

³ Coates, Adm'x, v. Bur., C. R. & N. R. Co., 62 Ia. 486.

lect to conform to its provisions in this respect renders the company responsible to a servant injured by reason thereof.¹

182. Where a system of blocking was adopted, under the requirements of the statute, which was claimed to be insufficient and inadequate, it was held to be the duty of railroad companies to adopt some reasonably safe and efficient system; that the use of an improper and inefficient system was not a compliance with the statute where there were in common use other systems which served the purpose.²

183. In speaking of the duty of a railroad company in reference to blocking of frogs, it was said: Such places, unprotected, are places of great danger, especially to men employed in coupling or uncoupling cars, and it is the duty of the company to guard its employees against the danger, if there be reasonably practical means for doing so, known to it. The case of *Hughes v. Railway Co.*, 27 Minn., distinguished.³

184. Whether a railroad company should have blocked frogs was held properly a question for the jury.⁴

185. Blocking an appliance to prevent its moving.—Neglect to block or cleat an appliance used for moving heavy bodies, so as to prevent their moving, does not affect the character of the appliance as being safe. Such duty, if required, is that of fellow-servants.⁵

186. Boilers; safety-plugs.—It was said in reference to the use of a boiler without fusible plugs, where their use was required by law, "we are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest, or the positive rules of law require, he is not to be responsible for an injury re-

¹ *Grand v. Mich. Cent. R. Co.*, 83 Mich. 564, 47 N. W. 837; *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645.

² *Eastman v. L. S. & M. S. R. Co.*, 101 Mich. 597, 60 N. W. 309.

³ *Sherman v. C., M. & St. P. R. Co.*, 34 Minn. 259.

⁴ *Hamilton v. Rich Hill Coal Mining Co.*, 108 Mo. 364.

For other cases relating to blocking frogs, see ASSUMED RISK, under head of SAFEGUARDS AND PRECAUTIONS.

⁵ *O'Keefe v. Brownell*, 156 Mass. 181.

sulting from such use because the negligence of one of his servants may have contributed to the result, or because the vigilance of the servant might have prevented the injury.”¹

187. Cars; footboards on.—Where a brakeman was injured by falling to the ground while passing over a flat-car loaded with machinery to reach brakes for the purpose of setting them, and it was charged that not providing a footboard, in connection with the position in which the car was placed in the train, was a neglect of duty, it was held that from the evidence the jury were justified in finding the company liable; and the fact that such manner of loading was customary did not relieve it from liability.²

188. Cogs and gearing.—It was held to be improper to permit evidence to go to a jury that machinery could be boxed at trifling expense, and equally improper that the machinery was actually covered after an accident. It is the legal right of every person to carry on a business which is dangerous, either in itself or in his manner of conducting it, if it is not unlawful and interferes with no right of other persons.³

189. It was held that neglect or omission to fence ordinary machinery having gearing and cog-wheels, used in a business, is not of itself sufficient to charge the master with liability for an injury to a servant which was preventable by the exercise of such a precaution.⁴

190. It was said that a workman employed to work a particular machine, which he fully understands, takes the risk of accidents that may happen to him while using it, so long as the machine is maintained in the same condition as by his contract he has a right to expect and rely upon. The master is not liable for accidents merely because he has not

¹ *Cayzer v. Taylor*, 10 Gray, 274. Mass. 396; *Tinkham v. Sawyer*, 153

² *Hosic v. C., R. I. & P. R. Co.*, 75 Mass. 485; *Rooney v. Sewall, etc. Cordage Co.*, 161 Mass. 153; *Mc-*

³ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572. *Guerty v. Hale*, 161 Mass. 51; *Hale v. Cheney*, 159 Mass. 268; *The Ma-*

⁴ *Sullivan v. India Mfg. Co.*, 113 Harajah, 40 Fed. 748.

adopted recent improvements that afford some additional protection.

This was said where the claim was that the cogs of a winch upon a vessel were not protected.¹

191. Where the petition alleged, among other things, that the employee was inexperienced with machinery and had worked but a few days in connection with the machine that caused him injury; that in brushing and cleaning such machine his hands came in contact with revolving cogs, which were uncovered, while such gearing upon all other similar machines in the factory were covered, it was held, upon exception, that the petition did not state sufficient to base a recovery; that it was not negligence *per se* to fail to cover cog-wheels; that the danger was obvious and the employee assumed the risk.²

192. It was said: Where a workman is employed to do a certain work with a machine which he fully understands, though it may not be of the newest pattern, and may require more care than newer patterns, but nevertheless is in perfect order of its kind, he takes the risk of all accidents which may befall him in its use.

This was said where the appliance claimed to be faulty had no covering over its cogs, though such appliances as were then customarily made were provided with such safeguards.³

193. Where a boy was injured upon a machine without guards, it was said: If a boy undertakes to work upon a dangerous machine, understanding the danger, and is injured, the employer is not liable therefor, although the machine would not have been dangerous if guards had been used. The reasoning of the court was that the machine was dangerous only because there was danger in working upon it, and if, in fact, it was dangerous, it was immaterial that the danger might have been averted by appliances protecting

¹The Maharajah, 40 Fed. 748.

³The Serapis, 51 Fed. 91, revers-

²Townsend v. Langles, 41 Fed. ing Same Case, 49 Fed. 393.
919.

against it. The defendants are not liable because they used a dangerous machine, but because they employed the plaintiff to use it in ignorance of the danger. If the plaintiff undertook the work knowing the danger, the defendants are not liable, although they might have prevented the danger by guarding against it. If the plaintiff did not know the danger, proof that the defendants could have guarded against it would be no defense.¹

194. It was said that a master may use a planing machine with or without shields over the cogs, as suits his convenience, and he is not liable to an employee injured while operating such a machine simply because the injury might have been prevented had guards been used.²

195. It was held that whether a gate might have been put up to guard employees, including minors, from coming in contact with machines having exposed gearing, or whether such machines ought to have been located differently, were improper questions for a jury.³

196. Where it was claimed that the employer was negligent in not covering a belt which supplied motive power to a machine which a boy between twelve and fourteen years old was operating, it was held that, in the absence of proof showing that it was usual to inclose such belts, no duty devolved upon the master to cover it. It was said the ground of liability is not danger, but negligence, and the test of negligence is the ordinary usage of the business.⁴

197. Where an employee, in an attempt to oil an iron punch driven by iron cog-wheels which were six or seven feet from the ground or floor of the shop, was injured by contact with such cogs, and the evidence was to the effect that it was not usual to box or fence such machinery, and that the machinery was so arranged with a tight and loose pulley that it could be stopped while oiling or repairing, it

¹ Gilbert v. Guild, 144 Mass. 601.

³ Rock v. Indian Orchard Mills,

² Schroeder v. Mich. Car Co., 56 Mich. 132, 22 N. W. 220.

142 Mass. 522.

⁴ Ford v. Anderson, 139 Pa. St. 261.

was held that the failure to box or fence such cogs was not of itself negligence.¹

198. The master's duty does not require that he shall cover a revolving wheel in a saw-mill called a bull-wheel, even though it might be done at trifling expense.²

199. Nor to cover the knives of a machine called a jointer, even where boys of the age of sixteen years are employed in the vicinity. It was said, however, that it was impracticable to have the knives covered when the machine was in operation.³

200. Where the argument was that the knives of a tenon machine should have been covered, it was said that the defendant was not required to use appliances so constructed that an injury cannot be inflicted by them under any circumstances. They must provide for their employees such appliances that they may be used, in the exercise of due care, with reasonable safety, and dangers and injuries must not result from defects in or the defective construction of the appliances considered in view of their use. It was further said: It does not appear that it is even usual or practicable to cover the knives. It was the plaintiff's duty to take notice of the fact that the knives were uncovered and avoid all dangers connected therewith.⁴

201. It was held error to submit to a jury the question whether an employer was negligent in not covering the knives upon a planing machine, when it was not shown that it was usual or feasible to cover them.⁵

202. Where it appeared the covering over cog-wheels was loose, that is, not fastened by any device, and an employee, while passing the same, slipped upon the floor and fell in such a manner as to displace the cover and place his hands between

¹Sanborn v. Atchison, T. & S. F. R. Co., 35 Kan. 292, 10 Pac. 860.

²Sjogren v. Hall, 53 Mich. 274, 18 N. W. 812.

³Palmer v. Harrison, 57 Mich. 182, 23 N. W. 624.

⁴Young v. Burlington Mattress Co., 79 Iowa, 415.

⁵Mackin v. Alaska Refrigerator Co., 100 Mich. 276, 58 N. W. 999.

the cogs, it was said that proof of these facts tended to show negligence on the part of the master in the matter of adequate guarding and covering the gearing so as to make it reasonably safe for employees who might in the performance of their duties have occasion to go in the vicinity of the machine. It was therefore a fair question for the jury whether the cog-wheels were so protected as to furnish the employees a reasonably safe place in which to do their work. It was also said that the slippery condition of the floor was a circumstance to be considered in connection with the principal question.¹

203. Where an employee was injured while taking boards from an edger, his hand getting caught in exposed cogs of such machine, and it appeared that when he went to work they were covered, but were uncovered at the time of the accident, and he had not noticed the change (in fact he had paid so little attention he did not know they had ever been covered), it was held that the question of defendant's negligence in not having kept the cogs covered was for the jury.²

204. Where a common laborer in a mill was injured by getting caught in exposed cogs upon a machine near which he was working, and it appeared they had been covered, but the covering had been off two weeks, it was held that it was dangerous to have the gearing open, and that ordinary prudence would have required it to be covered. That the time the covering had been off was ample for the defendant to have discovered the fact and replaced it.³

205. It was held a proper question for the jury whether the defendants, who were operators of a mill, should have covered gearing, or provided guards or guides to machinery, where it appeared an employee, in slipping, fell so that his hand came in contact with the knives. There was evidence tending to show that guides had been removed prior to the accident.⁴

¹ *Ames & Frost Co. v. Strachurski*, 145 Ill. 192, 34 N. E. 48.

² *Barbo v. Bassett et al.*, 35 Minn. 485.

³ *Wuotilla v. Duluth L. Co.*, 37 Minn. 153, 33 N. W. 551.

⁴ *Mullen v. Northern Mill Co.*, 53 Minn. 29, 55 N. W. 1115.

206. It was held that the omission to cover cogs and gearing in a saw-mill, where it could be done at trifling expense, and where such appliances were located near to the place where minor servants were required to do their work, rendered the place of work as to them unnecessarily dangerous and was negligence.¹

207. It was held that having cogs unguarded near where a young boy was at work, so that by the least inattention he was likely to get his hand in contact therewith, might be negligence under all the circumstances as to him. The controlling feature of the case was the inexperience and capacity of the boy.²

208. Dynamite; preparing and storing.—It was said that occupations which cannot be conducted without necessary danger to life, body or limb should not be prosecuted without taking all reasonable precautions against such danger afforded by science. Neglect in such case to provide readily attainable appliances known to science for the prevention of accidents is culpable negligence.

If an occupation attended with danger can be prosecuted with proper precaution without fatal results, such precautions must be taken or liability for injuries will follow, if injuries happen; and if laborers engaged in such occupations are left by their employers in ignorance of the danger and suffer in consequence, the employers are chargeable for their injuries.

This language, however, was applied to the careless manner of preparing, handling and storing of dynamite cartridges, whereby an explosion occurred in a building, injuring a minor servant who was ignorant of the dangers attending the method and manner used, and was not informed.³

¹Nadau v. White R. L. Co., 76 Wis. 120; King v. Ford L. Co., 93 Mich. 172, 53 N. W. 10; Roux v. Blodgett & Davis L. Co., 94 Mich. 607, 54 N. W. 492. For other cases relating to covering exposed gearing, see ASSUMED RISK, under head SAFEGUARDS AND PRECAUTIONS.

³ Mather v. Rillston, 156 U. S. 391.

² Coombs v. New Bedford Cordage Co., 102 Mass. 572.

208a. Where an employee was injured by an explosion while warming his hands at a fire while dynamite was being thawed, and it appeared that the fire was built for the double purpose of allowing employees to warm themselves and for thawing dynamite, and scientific experts of high character and reputation testified that the thawing of dynamite before an open fire in the open air was very dangerous, and that there were cheap appliances for thawing it, which greatly decreased the danger, while practical experts and railroad builders of character and wide experience, who had been engaged in using dynamite for many years, testified that the usual and common method of thawing dynamite was before an open fire in the open air, and that they regarded that method as safe and the most practicable, and had known very few instances in which injuries had resulted from dynamite being thawed in that manner, it was said, in reference to the duty of a master, that the degree of care required must be ascertained by the general usages of the business, and that the reason for such a rule was clearly and forcibly stated in the case of *Titus v. Railroad Co.*, 136 Pa. St. 618.

And held that an instruction should have been given, in effect, that the measure of ordinary care imposed upon the master for the safety of his servants in the use of dynamite was that ordinary care which reasonable and prudent men would and do exercise under like circumstances.¹

209. Elevators — Safety appliance on.— Where a boy less than fourteen years of age was injured while riding upon an elevator of his employers in the course of his employment, by his foot, which was extended over the side — the sides not being guarded or fenced — coming in contact with a floor sill, it was held: Whether the appliance, thus without guards, considering the purpose of its use for boys, of whom there was a large number, was a reasonably safe appliance, was a question for the jury.²

¹*Bertha Zinc Co. v. Martin's*
Adm'r (Va.), 22 S. E. 869.

²*Strawbridge v. Bradford*, 128
Pa. St. 200.

210. It was held not negligence to omit placing a safety appliance to prevent the falling of an elevator used for elevating freight, in case the cable should break, where persons were not permitted to ride upon it, and the danger from its fall to employees could not reasonably have been anticipated or foreseen.¹

211. Guards on machines.—An employee in a shop was injured by a stick being thrown back from a circular saw. He was passing around the saw at the time, carrying boards. It was charged the employer was negligent in not informing him that the saw was dangerous. This was said to be preposterous. It was also charged that he was negligent in not providing a spreader. This was held without merit, as the testimony showed such an attachment was not in general use, and there was no general agreement among mill-owners or practical sawyers that it was a desirable or useful safeguard. It was said that it is not enough that some persons regard it as a valuable safeguard. The test is general use.²

212. Whether or not an employer should have provided guards behind a rip-saw when used by an inexperienced person was held to be a question for the jury.³

212a. Where an employee, set to work upon a resawing machine, with the operation of which he was unfamiliar, was injured by a board being thrown back over the saw, caused, as was alleged, by failure to provide a guard, it was held that the allegation of his inexperience, and that he was put to work without instructions as to how to operate such a machine, were insufficient to warrant a recovery where it did not appear that the injury he received resulted to him by reason of his unskilfulness.⁴

213. Where it was alleged that a machine which an operative was required to use could have been made more safe by providing a contrivance to prevent motion in the ma-

¹ Kern v. De Castro & D. S. R. Co., 125 N. Y. 50.

³ Wheeler v. Wason Mfg. Co., 135 Mass. 294.

² Ship Building Works v. Nuttall, 119 Pa. St. 149.

⁴ Arizona Lumber & T. Co. v. Mooney (Ariz.), 42 Pac. 952.

chine while the employee's hand was in danger, and it appeared that other patterns of machines were in use that had attachments for such purpose, it was held that, so long as the machine was not defective in construction or out of repair, no obligation rested upon the master to make the machine more safe for use by an experienced employee by the addition of safeguards.¹

214. Whether a guard should have been provided upon a brick machine was left to the determination of the jury. It was said: Something in cases of this kind may be left to the common sense of the jury.²

214a. It was held that no duty rests on the master to provide a guard upon a resaw machine where the machine was not made with reference to guards and was in perfect condition, was one of the best patterns, and was the kind used in many other mills.³

215. Handles on tank cars.—It was held properly left to the jury whether a railroad company was negligent in not providing handles on tank cars for the use of brakemen in coupling. But this was held in the absence of proof of plaintiff's knowledge of the character of the appliance, of the proportion of cars thus provided, and whether the use of such cars was an obvious risk of the business.⁴

216. Lights, failure to provide — Platform.—Where it appeared that the third night of plaintiff's employment in a saw-mill, while he was engaged in pushing a loaded car on a platform elevated twenty feet from the ground, which at the place of the accident was narrowed, by reason of a curve, to a width outside the car track of but six or eight inches, he stepped therefrom and sustained injuries, and the only light furnished was that from a lantern of a fellow-workman, it was held that the verdict of a jury finding the

¹ Sweeney v. Berlin & Jones Envelope Co., 101 N. Y. 530. See, also, Cagney v. H. & St. J. R. Co., 69 Mo. 32.

² McMillan v. Union Press Brick Co., 6 Mo. App. 434.

³ Arizona Lumber & T. Co. v. Mooney (Ariz.), 42 Pac. 952.

⁴ Graham v. Boston & Albany R. Co., 156 Mass. 4.

defendant negligent and the plaintiff free from contributory negligence would not be disturbed.¹

216a. Signal-lights.—Negligence cannot be predicated on the absence of a signal-light where a proper light had been placed in position which was unexpectedly and without fault extinguished when it was apparently in good order.²

217. On switches.—It was held not negligence on the part of a railroad company to have switches without lights on them in its yard, in the absence of proof that such was the common and uniform practice, and that switchmen had a right to expect them.³

218. Railing on tender.—Where a section-man was injured by a piece of coal falling upon him from the tender of the locomotive, and it appeared that the capacity of such tender was barely sufficient for the run, it was held that evidence was proper showing that it was practicable to place railings around the top of the tender to safely increase its capacity.⁴

219. Switches — Locks.—It was said: We cannot doubt it would be negligence in a railroad company to have its switches entirely without locks to secure them, thereby putting it in the power of any reckless or malicious stranger to change them at will; and in respect to certainty and security, there may not be any great difference between a lock capable of being opened and no lock at all.⁵

220. Tell-tales.—Where the question was as to the non-use of whipping straps, it was said the rule was: Is it so manifestly serviceable as to command the consensus of intelligent railroad men so generally that it cannot be reasonably ignored or disregarded? Or is its utility disbelieved and disallowed in the management of many well-regulated

¹ *H. C. Ackley Lbr. Co. v. Rauen*, 58 Fed. 668 (C. C. A.).

² *Elgin, J. & E. R. Co. v. Malaney*, 59 Ill. App. 114.

³ *Grant v. Union Pac. R. Co.*, 45 Fed. 673.

⁴ *Union Pac. R. Co. v. Erickson*, 41 Neb. 1, 59 N. W. 347.

⁵ *Coleman v. Wilmington, etc. R. Co.*, 25 S. C. 446; *Birmingham R. & E. Co. v. Allen*, 99 Ala. 359, 13 So. 8.

railroads? If this question be debatable, and skilled railroad men honestly differ in judgment as to the utility of this or any other cautionary appliance, and differ to such extent as that many well-regulated railroads abstain from their use, then such abstinence is not legal negligence.¹

221. Where a brakeman was injured by a blow from a railroad tell-tale which was sufficiently raised above an ordinary freight-car, but not sufficiently raised above some of the cars used by the company, it was held that maintaining a tell-tale of insufficient height or undue rigidity was a breach of the company's duty to provide safe appliances for its employees; that the risk of injury from such a tell-tale was not one assumed.²

221a. Where an employee was injured while oiling a machine by the belt working from the loose to the tight pulley, and it was urged that the employer was negligent in not providing a means for locking the lever used in shifting the belt, it was held that the employer was not liable, even though such a device would have prevented the accident, in the absence of evidence that the machinery was defective or different from that in use elsewhere.³

F. Jury Not to Determine the Kind.

222. Rule.—A manufacturer may choose the kind of machinery he desires to use, be it old or new, and may control his business in his own way, provided he does no unlawful act. If the machinery is sound, well made and kept in repair, he will not be liable for an accident occurring to an employee, when the only ground alleged is that there is a better and safer kind used for the same purpose. Employers are only bound to use ordinary care in protecting an employee against danger not within his knowledge or observation. The comparative merits of machinery of different kinds,

¹ Louisville & N. R. Co. v. Hall,
91 Ala. 112, 8 So. 374.

³ Ross v. Pearson Cordage Co.,
164 Mass. 257.

² Darling's Adm'x v. N. Y., P. &
B. R. Co., 17 R. I. 708.

whether as to safety or utility, are questions most difficult to solve, and to say it shall be left to a jury to determine in a given case what kind an employer should use would be imposing a duty upon a court and an injustice upon the party alike intolerable.¹

223. Jurors must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall in effect dictate the custom or control the business of the community.²

224. It was said: Except to make another man's will for him after his death, there is nothing which a jury is more apt to think it can do better than the owner, especially under the stress of a claim for damages by one who has been injured, than to say how another man's business ought to have been managed, and nothing in which juries should be held more strictly and unflinchingly within their proper province.³

225. In the main, the state must leave every man to manage his business in his own way. If his way is not the best, nevertheless if others, with a full knowledge of what his way is, see fit to co-operate with him in it, the state cannot interfere to prevent nor punish him in damages when the risk his servant voluntarily assumes is followed by injuries.⁴

226. In the absence of defective construction or of negligence or the want of care in the reparation of machinery furnished by him, the master incurs no liability for its use. He is under no obligation to discard a machine or part of a machine and supply its place with something different, or with that which in the opinion of others is safer. He cannot be required to provide himself with other machinery or with new appliances, nor elect between the expense of so doing and the imposition of damages for injury resulting to a servant from the mere use of an older or different pattern.⁵

¹ Richards v. Rough, 53 Mich. 212, 18 N. W. 785.

⁴ Mich. Cent. R. Co. v. Smithson, 45 Mich. 212.

² Titus v. Bradford, etc. R. Co., 136 Pa. St. 618.

⁵ Sweeney v. Berlin & Jones Envelope Co., 101 N. Y. 520.

³ Kehler v. Schwenk, 144 Pa. St. 348.

227. Bridges.—Where a brakeman was killed by contact with the sides of a bridge, while he was in the act of ascending a car, it was held that the defendant was not guilty of negligence which caused his death.

To the charge that the bridge was too narrow for employees to safely perform their work it was said: The bridge was sound and safe for the passage of trains, without defect, and in good repair; whether it was fourteen or twenty feet wide was a matter of no concern to the brakeman, so long as he was not required to occupy a place of danger in the discharge of duties while passing over it, and this he was not required to do. A railroad company cannot be required to condemn and remove a bridge which is without fault in its plan or default in its construction while it is in good repair and safe for the passage of trains, simply because some engineer shall pronounce it not as good or convenient as some other kind. Railroad companies must be allowed to use their own discretion as to the kind of bridge they will use, and when and under what circumstances they will remove and replace them when they are safe. Any other rule would be unjust and oppressive. As between employers and employees, it is unquestionably the duty of a railroad company to provide a track and equipments which shall be reasonably safe, but this does not oblige the company to make use of the latest improvements or to change the structures upon its road to conform to the most recent or advanced improvements and ideas upon such subjects; neither does good railroading require any such thing.¹

228. Couplings.—It was held a proper question for the jury whether the coupling apparatus was imperfect as to the kind, or rather whether proper care had been exercised in supplying such for use. It appeared, however, the company were changing such appliances for another kind considered more safe.²

¹ *Illick v. Flint & P. M. R. Co.*, 67 Mich. 632.

² *Gibson v. Pacific R. Co.*, 46 Mo. 163.

229. Locomotive engines.—A railroad company has the right to determine for itself how powerful its engines shall be at any place and for any purpose, and it is not bound to furnish to its employees an engine suitable and adequate in power to every emergency. The fact, therefore, that an accident to an employee might have been avoided by the use of a more powerful engine does not make it liable, and this whether the engine was originally of small power or its power had been reduced by some defect.¹

230. Whether a foot-board upon a switch-engine was not a reasonably safe appliance by reason of its being constructed so that it slightly slanted to the front was held to be a proper question for the jury.²

231. Push-pole for moving cars.—Whether a pushing-pole, used to push cars by being placed diagonally from the engine to a car, was a reasonably safe and suitable instrument for the purpose without a handle, was held to be a proper question for the jury.³

232. Machine of new design.—Where an employee in a furniture factory was injured by a knife flying out of a machine of a new design, invented by one of the managers, when first used, which machine differed from other machines in the method of holding the knives, it was held that whether it was a reasonably safe implement and properly designed was a question for the jury.⁴

233. Safeguards.—It was held that whether a gate might not have been put up to guard employees, some such being minors, against coming in contact with machines having exposed gearing, or whether such machines ought not to have been located differently, were improper questions for the jury.⁵

¹ *Bajus v. S., B. & N. Y. R. Co.*,
103 N. Y. 312.

² *O'Mellia v. Kansas City, S. J. &
C. B. R. Co.*, 115 Mo. 205.

³ *Philadelphia, etc. R. Co. v.
Keenan*, 103 Pa. St. 125.

⁴ *Marshall v. Widdicomb Fur. Co.*,
67 Mich. 167, 34 N. W. 541.

⁵ *Rock v. Indian Orchard Mills*,
142 Mass. 522.

234. Switches.—Where the evidence as stated by the court showed that in the construction of a split-switch the rails could be set within two and one-half inches of each other, and the danger complained of be avoided, and that in fact they were set about three and three-fourths inches apart, and thus were more likely to catch the foot of an employee, it was held that the question of negligence on the part of the defendant in the method of constructing the switch was proper for the jury, and their verdict against the defendant was approved.¹

235. Tracks.—Where the charge of negligence was the failure to properly ballast a side-track, it was said: It is not within the province of courts and juries to prescribe the manner of using side-tracks or the character of the appliances which an employer may use, by verdicts and judgments which disregard an employer's right to conduct his business in the manner usual with well-regulated railroads and as good railroading requires.

It would seem from a review of the authorities that we may deduce the principle that obvious imperfections in methods or machinery existing at the time of the employment cannot be made the basis of liability in favor of an employee who suffers injury in the course of his employment, for the reason that the master has a right to use imperfect methods and tools, and to ask others to enter his employ to aid him in such use, and that in so doing he does not undertake to insure the employee.²

236. There is no rule of law to restrict railroad companies as to the curves they shall use in their freight stations and yards, where the safety of passengers and the public is not involved. The engineering question as to the curves proper to be made in the track of a railroad within such places is not a question to be left to a jury to determine.³

¹ Brooke v. C., R. I. & P. R. Co.,
81 Iowa, 504.

³ Tuttle v. Milwaukee Ry. Co.,
122 U. S. 189.

² Ragon v. Toledo, A. A. & N. M.
R. Co., 97 Mich. 265, 56 N. W. 612.

237. Nor is it proper to submit to a jury the question whether a side-track is properly constructed.¹

238. Yet where an engineer upon a railroad constructed along the foot of a mountain range was killed by the derailment of his engine by reason of gravel on the track, which during a storm had washed down the mountain side through a natural gully, there being no culvert for its escape under the track, it was held that the question of negligence in not constructing a culvert at the place was one for the jury to determine on the evidence, as to the construction of the road and the formation of the land. *Tuttle v. Railway Co.*, 122 U. S. 189, distinguished.²

239. **Turn-tables.**—Where a railroad company located its turn-table close to the track upon which engines were accustomed to move, and subsequently the company put in use larger engines, which when being turned upon the table were liable to be struck by passing engines, and an employee while engaged in turning one such was injured by a passing engine striking the one he was turning, it was said (referring to the larger engine) that if this rendered the operating of the turn-table dangerous to the employee, it was the duty of the company to have made such corresponding changes in the track and turn-table as would have rendered the handling of the larger engines reasonably safe to the employee.

The general principle of law is, that where a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care and to use all reasonable means to guard against defects from which increased or unnecessary danger may occur.

It was held a question for the jury whether there was negligence in the construction and continued use of the track and turn-table.³

¹ *Twitchell v. Grand Trunk R. Co.*, 39 Fed. 419.

³ *Lake Shore & M. S. R. Co. v. Fitzpatrick*, 31 Ohio St. 479.

² *Union Pac. R. Co. v. O'Brien*, 49 Fed. 538 (C. C. A.).

240. Where an employee in a saw-mill was injured while operating a saw, by a board being thrown from the saw against him, and the contention was that the master failed in his duty to provide some guard or protection which would prevent such an accident, after stating that the master's duty was controlled by general usage in the business, and that this did not sufficiently appear, it was said: It will not answer to submit to a jury the question of the negligence of the master upon opinions of experts stating what ought to have been provided, and to charge one with negligence for failure to provide accordingly. It is error to submit to a jury the question whether the master should have employed the device, in the absence of sufficient evidence of general usage; for jurors are not at liberty to charge a duty upon the master according to their own notions of what was proper under the circumstances, nor upon the opinion of experts of what was desirable and prudent. The thought was well expressed in *Titus v. Railway Co.*, 134 Pa. St. 618: "Jurors must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall in effect dictate the customs or control the business of the community."¹

G. The Duty in Respect to Furnishing Appliances is Personal to the Master.

See FELLOW-SERVANTS.

241. Rule.—The master's duty extends to procuring and maintaining his appliances. He is bound to provide proper road, machinery, equipments, and proper servants. For the management of his machinery and the conduct of his servants he is not responsible, but he cannot avail himself of this exemption from responsibility when his own negligence in not having suitable instruments, whether of persons or things, to do his work, causes injury to those in his employ.

An act or duty which the master is bound to perform for

¹ Mississippi River Logging Co. peals, Seventh Circuit, January v. Schneider, Circuit Court of Ap- Session, 1896; 74 Fed. 195.

the safety and protection of his servants cannot be delegated so as to exonerate him from liability for an injury to a servant caused by an omission to perform it, or by negligent performance, and this whether the misfeasance or non-feasance is that of a superior or inferior officer, agent or servant to whom the performance of the act or duty has been committed.¹

242. It was said: It is well settled that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and furnish sufficient and safe material, machinery or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused another servant by its omission. Indeed, no duty required of him for the protection and safety of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risk arising from the want of sufficient and skilled co-laborers or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him.²

243. A master employing a servant impliedly engages with him that the place in which he is to work, or by which

¹ *Gilman v. Eastern R. Co.*, 10 Allen, 433; *Fuller v. Fewett*, 80 N. Y. 46; *Kirkpatrick v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 240; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Brann v. Chicago, etc. R. Co.*, 53 Ia. 595; *Corcoran v. Holbrook*, 59 N. Y. 517; *Hough v. Railway Co.*, 100 U. S. 213; *Wabash, etc. R. Co. v. McDaniels*, 107 U. S. 45; *Ohio & Miss. R. Co. v. Percy*, 128 Ind. 197; *L. E. & S. L. C. R. Co. v. Utz*, 133 Ind. 265; *McGatrick v. Wason*, 4 Ohio St. 566; *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632; *Morton v. Railway Co.*, 81 Mich. 423; *Northern Pacific R. Co. v. Herbert*, 116 U. S. 650; *Van Dusen v. Letellier*, 78 Mich. 502; *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294; *Flike v. Railway Co.*, 53 N. Y. 549; *Fox v. Iron Co.*, 89 Mich. 393; *Bessex v. Railway Co.*, 45 Wis. 482; *McClarney v. Railway Co.*, 80 Wis. 278; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Davis v. Central Vt. R. Co.*, 55 Vt. 91.

² *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642-650; *Hough v. Railway Co.*, 100 U. S. 213.

he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter his service he impliedly says to him there is no other danger in the place, the tools and the machinery than such as is obvious and necessary. Of course some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is matter of necessity, and cannot be obviated. But within such limits, the master who provides the place, the tools and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other.¹

244. The duty which the master owes to his servant is the one which he cannot rid himself of by casting it upon an officer, agent or servant employed by him. Where the duty is one owing by the master and he intrusts its performance to an agent, the agent's negligence is that of the master. As the master is charged with the imperative duty of providing safe and suitable appliances, this duty he must perform, and if he intrusts it to an agent and the agent performs it in his place, the agent's act is that of the master. If the master cannot be held responsible for the negligence of these agents in selecting, arranging and maintaining the

¹ Balt. & Ohio R. Co. v. Baugh, 149 U. S. 368; Union Pac. R. Co. v. Daniels, 152 U. S. 684.

machinery, the result will be that he is wholly absolved from his duty to his agents and servants.¹

245. In passing upon an instruction that it is an absolute duty, on the part of the employer to his servant, to see to it that the machinery is reasonably safe, and that he must provide such safeguards as common experience in the business had shown to be necessary, whether the employer personally knew they were necessary or not, it was held that such instruction was misleading. It was said: The implied duty of the master being measured by the legal standard of ordinary care, his knowledge or want of knowledge of the actual condition of the machinery when it falls below the legal standard of being reasonably safe becomes a material element. When the master does not know of the dangerous condition of the machinery and has exercised that standard of care in relation thereto, he has discharged his duty, and there is nothing upon which negligence can be predicated. Hence the rule that if the master knew or ought to have known, and the servant did not know and was not bound to know, of the insufficiency or defective condition of the machinery, the master is liable; and it is equally true in every case, that, unless the master knew of the defects or was under a duty of knowing it, he cannot be held liable.²

246. The rule was carried to the extent of holding that an employee whose duty was to select bags from a mass furnished, used in an oil factory, in selecting one that had a hole in it, which rendered the operation of the machine unsafe, was, as to such act, in the performance of a duty personal to the master in respect to furnishing safe appliances.³

247. It was said: It may now be considered as settled that if a person employs others, not as servants, but as me-

¹ *Indiana Car Co. v. Parker*, 100 Ind. 181; *Krueger v. L. N. A. etc.* 96. *Loup v. California S. R. Co.*, 63 Cal.

R. Co., 111 Ind. 51; *Pennsylvania* ² *Hull v. Hall*, 78 Me. 114.

Co. v. Whitcomb, 111 Ind. 212; ³ *Carter v. Oliver Oil Co.*, 34 S. C. *Mitchell v. Robinson*, 80 Ind. 281; 211.

chanics or contractors in an independent business, and they are of good character, if there was no want of due care in choosing them, he incurs no liability for injuries resulting from their negligence or want of skill. If I employ a well-known and reputable machinist to construct a steam-engine, and it blows up from bad materials or unskilful work, I am not responsible for any injury which may result either to my servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of its construction. The machinist then becomes my servant, and *respondeat superior* is the rule.¹

248. The same reasoning was applied where a bridge fell from defects in construction, and it was held the defendants would not be liable to an employee thus injured where it appeared that they exercised ordinary care in selecting an experienced builder to construct the bridge, and that the builder had supervision and control of the work, unless it should appear that the defendants had knowledge of the defects from which the accident arose and neglected to remedy the same. That it was a matter of no consequence that the builder was employed by the day.²

249. It is not a universal rule that an imperative duty rests upon the master to furnish suitable means, machines and implements and instrumentalities for doing his work. This may depend upon the nature of the employment and the circumstances of the case. It may be that the conditions existing or the circumstances require that the servant should procure the tools, or that the servant is to exercise his judgment as to the kind of simple appliances he may use. If the servant requires a lever to be provided at the place of work to elevate a heavy body, he will be required to exercise his judgment whether he will use a rail, a stake or an iron bar.

This reasoning was applied where a foreman used blocks, furnished by a servant, merely as a means to be used in con-

¹ *Ardesco Oil Co. v. Gilson*, 68 Pa. St. 146.

² *Mansfield Coal, etc. Co. v. McEmery*, 91 Pa. St. 185.

nection with a lever to hoist a heavy article, and the blocks tipped. The charge was that they were an unsuitable appliance.¹

II. REPAIRS AND DEFECTS.

A. *Duty Personal to the Master.*

See FELLOW-SERVANTS.

250. The master owes the personal duty to his employees of the exercise of reasonable care to keep and maintain the appliances furnished for their use, or with which they may come in contact while doing their work, in proper repair.²

251. It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives, and it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and in safe working order, and if these duties or any of them are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have intrusted the performance of such duties to subordinates, by whatever name they may be called.³

¹ Robinson v. Blake Mfg. Co., 143 Mass. 528; Potter v. C., R. I. & P. R. Co., 46 Iowa, 399.

² Brabbitts v. C. & N. W. R. Co., 38 Wis. 289; Schultz v. C., M. & St. P. R. Co., 48 Wis. 375; Wedgewood v. C. & N. W. R. Co., 44 Wis. 44; C. & N. W. R. Co. v. Jackson, 55 Ill. 492; Cregan, Adm'r, v. Marston et al., 126 N. Y. 568; Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607, 54 N. W. 492; Vandeußen v. Letelleir, 78 Mich. 492, 502; Fuller v. Jewett, 80 N. Y. 46.

³ Gunter v. Graniteville Mfg. Co., 18 S. C. 262; Indiana Car Co. v. Parker, 100 Ind. 181; Corcoran v. Holbrook, 59 N. Y. 517; Brann v. Chicago, etc. R. Co., 53 Iowa, 595;

Balt. & Ohio R. Co. v. Baugh, 149 U. S. 368; Hough v. Railway Co., 100 U. S. 213; Ohio & Miss. R. Co. v. Percy, 128 Ind. 197; Houston & Texas R. Co. v. Dunham, 49 Tex. 181; H. & T. C. R. Co. v. Marcellus, 59 Tex. 334; Cooper v. P. C. & St. L. R. Co., 24 W. Va. 37; Atchison, T. & S. F. R. Co. v. Moore, 29 Kan. 632; Moon's Adm'r, v. R. & A. R. Co., 78 Va. 745; Torians, Adm'r, v. R. & A. R. Co., 84 Va. 192; Lewis, Adm'r, v. St. L. & I. M. R. Co., 59 Mo. 495; Shanney v. Androscoggin Mills, 66 Me. 420; Fay v. Minneapolis & St. Louis R. Co., 30 Minn. 231; St. Louis, I. M. & S. R. Co. v. Harper, 44 Ark. 524; Mulvey v. Locomotive Works, 14 R. I. 204.

252. It was said the servant has no more control over the repairs than of the purchase, no more responsibility for the one than the other. The person whose duty it is to keep the machinery in order, so far as that duty goes is not in any legal sense the fellow-servant of employees called to use it. To provide machinery and keep it in repair, and to use it for the purpose intended, are very distinct. They are not employments in the same common service, leading to the same common results. The one may be said to begin where the other ends.¹

253. The rule was applied when an elevator chain broke, letting the elevator fall, it appearing that six weeks prior the chain had broken and had been repaired.²

254. Foreman in charge of a pile-driver.—The rule was applied to a foreman having in charge a pile-driver, whose duty it was to maintain or see that the same was kept in repair, in permitting the appliance to become out of repair.³

255. In selecting rope.—The rule was applied to a foreman who was ordered to move a barge from the water, without direction as to means, in selecting from that which the employer had, an unsafe rope, which broke and injured an employee assisting in the work.⁴

256. Inspectors of cars.—A master's duty to supervise and inspect dangerous machinery, which his servant is required to use, cannot be so delegated to other servants as to relieve the master from liability on the ground that the failure to inspect was the negligence of a fellow-servant.⁵

257. Where a foreman employed in defendant's railroad yard was injured by the explosion of a locomotive boiler, and the court charged the jury in substance that the master is not the insurer of the safety of his engines, but is required

¹Shanney v. Androscoggin Mills, 66 Me. 420.

²Mulvey v. Locomotive Works, 14 R. I. 204.

³Schultz v. C., M. & St. P. R. R. Co., 48 Wis. 375.

⁴Lund v. Hersey Lumber Co., 41 Fed. 202.

⁵C. & E. I. R. Co. v. Knerim, 152 Ill. 458, 39 N. E. 324; C., B. & Q. R. Co. v. Avery, 109 Ill. 314; C. & N. W. R. Co. v. Jackson, 55 Ill. 492.

to exercise only ordinary care, such as a prudent man would use to keep them in good repair, and that, if the jury believed that the boiler which exploded was defective, and the defendant's servants, by reasonable care, might have known of such defects, then the defendant would be responsible, it was held that such instruction was proper, and it was not error to refuse to instruct in substance that, if the defendant used ordinary care in the selection of the engine and in the selection of a competent man to inspect it, and such inspector negligently failed to discover or report the defects in the engine, the defendant would not be liable.¹

258. Section master.—The rule was also applied to a section master through whose neglect in repairing a track a train was derailed, causing injury to one of the train employees.²

259. Exceptions.—The general rule does not apply to defects arising in the daily use of an appliance, which are not of a permanent character and do not require the help of skillful mechanics to repair, but which may easily be and usually are repaired by the workmen, and to repair which proper and suitable materials are supplied.³

260. This exception was applied to a rope called a fall, attached to a derrick used in hoisting buckets of coal from the hold of a vessel.⁴

261. It was also applied to steps upon an engine which had become loose, and it was held to be the duty of an engineer to fix the steps upon his engine when they merely became loose, when he was provided with tools to do this

¹ *Texas & Pacific R. Co. v. Barrett*, 67 Fed. 214. See, also, *INSPECTION; FELLOW-SERVANTS*.

² *Moons, Adm'r, v. R. & A. R. Co.*, 78 Va. 745; *Torians, Adm'r, v. R. & A. R. Co.*, 84 Va. 192; *Brickman v. South Carolina R. Co.*, 8 S. C. 173.

³ *Daley v. B. & A. R. Co.*, 147 Mass. 101; *Gotleib v. Railway Co.*, 101 N. Y. 462; *Benzing v. Steinway*,

101 N. Y. 547; *Baker v. Railway Co.*, 95 Pa. St. 211; *Cone v. Railway Co.*, 81 N. Y. 208; *Murray v. Usher*, 117 N. Y. 543; *Fuller v. Jewett*, 80 N. Y. 46 (*Corcoran v. Holbrook*, 59 N. Y. 518, distinguished); *Cregan, Adm'r, v. Marston et al.*, 126 N. Y. 568.

⁴ *Cregan, Adm'r, v. Marston et al.*, 126 N. Y. 568.

work; that a brakeman who was injured by such a defect, while attempting to mount the engine in the line of his duties, had no claim against the company.¹

262. It was also applied where a fireman was injured by reason of the engine-step being loose and out of repair. It was said that it may not have been the duty of the fireman to inspect this step which he was constantly using, but it was the duty of the engineer, and they were fellow-servants.²

263. It was also applied when the neglect of duty charged was permitting a large circular saw to become dull, from which injury was caused an employee. It appeared that the master had provided others for a change in such cases and employed competent men to sharpen them. It was said that the master's duty in respect to the appliances furnished for use does not extend to every detail in the management of safe and adequate machinery.³

263a. Where the only provision made by a railroad company in respect to the inspection of its locomotives is that this duty shall be performed by the engineers, it was held that the question whether knowledge of a defect in the push-bar by the engineer before starting on the trip was chargeable to the company was for the jury.⁴

264. The duty which the master owes to his servants is to furnish them with safe tools and machinery where that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use it is the duty of the servant to observe and report to his employer. The servant has the means of discovery of any such defect which the master does not possess.⁵

¹ *Miller v. G. T. & C. R. Co.*, 90 Mich. 230, 51 N. W. 370.

² *Texas & P. R. Co. v. Patton*, 61 Fed. 259 (C. C. A.).

³ *Webber v. Piper et al.*, 109 N. Y. 496.

⁴ *McDonald v. Mich. Cent. R. Co.* (Mich.), 65 N. W. 597.

⁵ *Baker v. Alleghany Valley R. Co.*, 95 Pa. St. 211; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Texas & Pac. R. Co. v. Patton*, 61 Fed. 259 (C. C. A.); *Mensch v. Pennsylvania Co.*, 150 Pa. St. 598.

265. A workman who has charge of or uses appliances in the performance of his work is required by law not only to use such care as to their condition as will save himself from personal injury, but his duty to his employer and to himself requires that he exercise proper watchfulness in order to preserve such appliances in a condition which will render them safe and fit for the purposes for which they were designed; and if repairs are required he must either make them himself or report the condition of things to his employer or other person whose duty it is to make such repairs.

This principle was applied to an employee who was injured by the falling of a defective stair, for which he was responsible.¹

266. Where an employee whose duties are in connection with the operation of an appliance is charged with the duty of observing its condition as to becoming defective and out of repair and report to the master, he cannot be heard to say that the master is chargeable with neglect as to such matters, as these come within the scope of his duties. Hence, where a brakeman was injured by a nut becoming loose which held in place a brake-wheel upon a car, it was held the company was not liable; that the condition of the brake was a matter under the special care of such employee, and it was his business at all times to see that the appliance was in fit condition and report defects therein.²

267. The supreme court of Illinois thus state the rule: It is primarily the duty of the master to provide good, safe and proper machinery so far as reasonable skill and diligence can construct it, but when that duty has been once performed, it is a duty devolving upon the servants operating it to observe that it is in proper repair and report to the master.³

¹Stroble v. C., M. & St. P. R. Co., 72 Ill. 138; Chicago & Alton R. Co. v. Bragonier, 119 Ill. 51, 7 N. E. 70 Iowa, 555.

²Illinois Cent. R. Co. v. Jewell, 68; C. & N. W. R. Co. v. Jackson, Adm'r, 46 Ill. 99. 55 Ill. 492.

³Toledo, W. & W. R. Co. v. Eddy, For other cases within the ex-

268. Another exception to the rule is, that where a master provides and keeps proper tools for the use of his servants, whose duty it is to select such as they require for their work, he is not in general responsible if a servant selects or voluntarily uses a tool which has become obviously defective and unfit for use, and is injured by reason of such defect, or his co-laborers suffer injury therefrom.¹

268a. Where the foreman of his master's establishment directs an employee, who is employed for the purpose of keeping the machinery in repair, to repair a defect known to him, and such repairer neglects so to do, neither the foreman nor the employer can be charged with negligence on account of such defect at the suit of the operative injured by reason thereof. The neglect is that of the repairer, who is a fellow-servant of the operator.²

B. *Rules in Particular States.*

1. Alabama.

269. Accidents from which personal injury may result proceeding from defects originally existing in appliances or which result from their use are like the negligence of fellow-servants, of the incidental hazards of the service to which the servant must have contemplated he would be exposed. When such appliances have been furnished, when diligence has been observed in procuring them, the use of them is necessarily intrusted to the servants of a railroad company, as is their care and inspection and repair of them, and determining when the use must be abandoned until repairs are made. This duty may be intrusted to those oper-

ception see ASSUMED RISK; SERVANTS' DUTIES; CONTRIBUTORY NEGLIGENCE.

¹Heffern v. Northern Pac. R. Co., 45 Minn. 471; Faber v. Carlisle Mfg. Co., 126 Pa. St. 387; Robinson v. Blake Mfg. Co., 143 Mass. 528;

Callaway v. Allen, 63 Fed. 297 (C. A.); Thyng v. Fitchburg R. Co., 156 Mass. 13; Carroll v. W. U. Tel. Co., 160 Mass. 152.

²Schulz v. Rohe et al., 149 N. Y. 132.

ating the appliances or confided to other servants having no other duty than that of inspection or repair.

This rule was declared where a brakeman was injured by reason of a broken draw-bar or bumper.¹

2. Arkansas.

270. While the general doctrine in respect to the furnishing of appliances and maintaining them in repair was broadly stated, yet it was said to be limited in its operation to those who were employed to look after and see that these things were done.

The facts were that the boiler of an engine exploded, and it was contended that the company was negligent in not making a complete test of the boiler after the engine had been in a collision. It was further stated: We do not mean to determine that the rule would extend to every subaltern who hammers on an engine in the course of repairs, but, when the company appoints an agent for a particular purpose, his acts in the line of his specialty are the acts of the company.

Again, in reference to an instruction relating to notice or knowledge on the part of the defendant, it was said: If any knowledge of defects in the boiler or want of care in not discovering them was shown, it was as much imputable, under the instructions, to the plaintiff's co-servants who aided in the repairs as to the persons standing in the master's place. For these reasons the instructions were erroneous and a new trial should have been granted.²

3. Maryland.

271. Rule in.—Though it is the duty of a railroad company to exercise all reasonable care and caution in procuring for its operation sound machinery and faithful and com-

¹Smoot v. Mobile & M. R. Co., 67 Ala. 13; Mobile & Ohio R. Co. v. Thomas, 42 Ala. 672-725. ²St. Louis, I. M. & S. R. Co. v. Harper, 44 Ark. 524.

petent employees, and though they are liable to their servants for a neglect of this duty, yet, after they have procured such machinery and employees, they are not liable to a servant for the injuries occasioned by the neglect of one of his co-servants employed in the same general business of operating the road.¹

272. This rule was applied to an engine known to be out of repair.²

273. The master is not liable to his servant for any injury occasioned by a defect of machinery furnished to the latter to operate, unless he was negligent in providing such machinery, or knew of the defect and omitted to warn the servant of its existence. And where the defect producing the injury complained of was the consequence of the incompetency or neglect of a fellow-servant, or where the origin of the defect did not appear, the master is not liable to the servant, unless it appears that he had been guilty of negligence, either in selecting the fellow-servant or in providing machinery in which the defect occurred. It follows that a brakeman on the train is in the same common employment with the mechanics in the shop to repair and keep in order the machinery, and with the inspector of the machinery and rolling-stock of the road, and the superintendent of the movement of trains.³

274. This rule was applied where a locomotive boiler exploded, injuring an employee, and it appeared that it was purchased by the general superintendent and master mechanic; that it was old and defective. It was held that such persons in the act of purchasing machinery were directly representing the master, but that the master mechanic, as to the ordinary acts which related to his position and department, and in respect to repairs, was merely a fellow-servant with other employees.⁴

¹O'Connell v. Balt. & Ohio R. Co., 20 Md. 212; Shauck v. Northern Cent. R. Co., 25 Md. 462; Cumberland Coal & Iron Co. v. Scalley, 27 Md. 589.

²Shauck v. Northern Cent. R. Co., 25 Md. 462.

³Wonder v. Balt. & Ohio R. Co., 32 Md. 411.

⁴Cumberland & Penn. R. Co.

4. Massachusetts.

275. Rule in.—When a master has provided suitable structures, means and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means, directly, in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by means of new appliances and adaptations incidental to their use, are fellow-servants in the general employment and business. One employed in the care and supervision and ordinary repair of the means and appliances used in a business is engaged in the common service.¹

276. If a corporation itself should be held responsible to its servants that the road when first used was safe and sufficient, yet keeping the road in proper repair afterwards would seem to be the work of servants or laborers as much as any other part of the business of the corporation.²

277. Where a master employs competent servants to make the ordinary repairs upon machines which other servants are using, to keep them in order from day to day, he has met the full measure of his duty. Those employed to make the repairs and those using the machines are fellow-servants.³

278. An employee was injured while cleaning a cordage machine by the pushing in of a movable board which was insecurely fastened, the screw not being tightened which held the button. It was held that the duty of attending to such work devolved upon a fellow-servant and the master was not liable.⁴

279. It was held, in the case of a corporation owning a lighter, that it was bound to use reasonable care in maintaining in suitable condition the appliances used on board the

v. State to use of Moran, 44 Md. 283.

² King v. Boston & W. R. Co., 9 Cush. 112.

¹ Johnson v. Boston Tow-Boat Co., 135 Mass. 209; McKinnon v. Norcross et al., 148 Mass. 533.

³ McGee v. Boston Cordage Co., 139 Mass. 445.

⁴ Smith v. Lowell Mfg. Co., 124 Mass. 114.

lighter by its servants in hoisting and lowering merchandise, but if it furnished such appliances and employed competent servants to see that they were kept in proper condition, and provided the means sufficient for such purpose, it was not liable for an injury occasioned to one servant by the parting of a rope in consequence of its being weak from long use, and after its defective condition had become known to the servant whose duty it was to replace it. It was also held whether such servant acted as a fellow-servant or as the representative of the master was a question of law.¹

280. Yet where an employee was injured by means of a defective rope used in connection with an appliance, it was held a question for the jury as to the liability of the master. There was evidence tending to show that the servant who was in charge of the appliance had instructions merely to get a new rope in case the one supplied became defective. A distinction was drawn by the court between the rule announced in *Johnson v. Boston Tow-boat Co.*, 135 Mass. 209, and the case in hand. That in the one case the servant was to make the repairs or supply the defective tool from means provided and at hand, while in the other they were not actually provided, but he must ask for them; thus the ultimate control of the repairs in the latter case was with those who were to furnish the means rather than those who were to use them.²

281. It was said that the master's duty was not only to furnish appliances, but extended to maintaining them in suitable condition. This was said in reference to a defect in the boiler of a locomotive which exploded, causing injury to the engineer. It appeared, however, that the engine had to a certain extent been rebuilt.³

282. It is the duty of the master to exercise a reasonable supervision over the condition in which the machinery,

¹*Johnson v. Boston Tow-boat Co.*, 135 Mass. 209; *McKinnon v. Norcross et al.*, 148 Mass. 533.

²*Daley v. Boston & Albany R. Co.*, 147 Mass. 101.

³*Ford v. Fitchburg R. Co.*, 110 Mass. 243. The language used in this case is misleading. See criticism in *Bailey's Master's Liability*, p. 255.

structures and other appliances used in his business are kept by his servants, and he cannot wholly escape responsibility by delegating the performance of this duty to servants. That the negligence of his servants in repairing or failing to repair machinery is not necessarily the negligence of the master, but it is also to be determined in each case whether the master has exercised a reasonable supervision over his servants and reasonable care in seeing that his machinery is kept in proper condition, although he may have employed competent servants and furnished them with suitable materials, and instructed them to keep the machine in repair. "We are aware," say the court, "that this rule is somewhat indefinite, and is perhaps not precisely that which prevails in the United States." This was said in reference to a carding machine, which the evidence showed had been rendered dangerous by long-continued defect, and where it appeared there was a habit on the part of the defendant's servants to renew the lags of the machine only when it ceased to do good work and without regard to its condition as a dangerous machine.¹

283. A railroad company was held liable to an employee who was injured by reason of a bridge-guard or tell-tale being out of order. It did not appear that the company had notice that the rope had broken which held the device in position, nor that it had been broken such a length of time that notice would be presumed, but there was evidence sufficient to sustain a finding that the company had not used due care in the examination of the device as to its condition, when, if such care had been exercised, it would have led to a discovery of the defective condition of the rope.²

284. Where it appeared that the brake-heads upon cars were, from the particular use to which the cars were put, liable to become broken, and it was the custom to have them repaired at the place by a competent person employed

¹ Rogers v. Ludlow, 144 Mass. 198. ² Warren v. Old Colony R. Co.,
See, also, Rice v. King Phillips 137 Mass. 204.
Mills, 144 Mass. 204; Warden v. Old
Colony R. Co., 137 Mass. 204.

for that purpose, who came twice a week, and it was the duty of the workmen, if a car became obviously defective, to set it aside until he came, it was held that a servant injured by reason of such a defect had no ground of recovery against the master. The neglect was that of a fellow-servant.¹

285. An employee was injured by the breaking of a rotten stake used to hold a load on a platform car and also to aid brakemen in passing from car to car. It was said: The use of the stake as a means of facilitating the passage of a brakeman from car to car of the train made it the duty of the defendant to use due care to see that it was suitable for that purpose. It appeared that the defendant furnished enough good lumber for the purpose of making stakes, and that it was sawed up into stakes under the direction of the section master. The accident happened in New Hampshire. In the absence of proof to the contrary, the law of the latter state was assumed to be the same as in Massachusetts. It was further said: The case is not one where an implement designed for repeated use had been weakened and made unfit for further service by such use; it is rather the case of furnishing of an implement never fit for use and evidently unfit. Such a stake could not without negligence have been placed where stakes were kept to be used for the purpose to which this was put. Inquiry need not be made, if it had been taken from a number of sound and suitable stakes provided for that purpose by a workman whose duty it was to equip the car, whether the careless taking of this stake would have been negligence of a fellow-workman, the risk which the plaintiff must stand, or whether negligence in equipping the car with stakes is something for which the defendant is responsible, whether it intrusts the work to one person or another. The defendant's evidence falls far short of showing there was a sufficient supply of sound and suitable stakes. It shows only that the defendant supplied lumber enough for the purpose, and men enough to prepare

¹ Dodge v. Boston & Albany R. Co., 155 Mass. 448.

the stakes. That this stake was among those so prepared would justify a finding that it was there through the negligence of the men whose duty it was to prepare them, and for that negligence, at least, the defendant was answerable.¹

286. In the absence of an express stipulation, the master impliedly agrees to provide and maintain reasonably safe and suitable machinery and appliances, so far as the exercise of proper care on his part will secure them; and the servant agrees to assume all the ordinary risks of the business, and, among them, the risk of injury from negligence of his fellow-servants. The obligation which the master assumes is personal, and pertains to him in his relation to the business as proprietor and in his relation to the servant as master. It has been repeatedly held that he cannot discharge it by delegating the performance of his duty to another, and, if he employs servants or agents to represent him in the performance of this duty, they are to that extent agents or servants for whose conduct he is responsible. The very nature of the implied contract created by the hiring, whereby he undertakes to use proper care in always providing safe tools and appliances, is inconsistent with the delegation of the duty to a fellow-servant, for whose negligence he is not to be responsible. His obligation involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the conditions as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they come into the hands of his servant for use, and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risks of the business, to enable him to reasonably protect his servant from dangers which he should prevent. It is obvious that different questions arise, in cases of this kind, in determining the implied obligations of the respective parties under peculiar circumstances. In many kinds of business the condition of a machine as to

¹ *McIntyre v. Boston & Maine R. Co.*, 163 Mass. 189, 39 N. E. 1012.

safety is constantly changing with the use of it; and it is safe or unsafe at a given moment according as it is properly or improperly used and managed by the person who operates it. Moreover, certain kinds of repairs can be conveniently and properly made, under direction and supervision, by servants regularly employed in the business. In such cases both parties to the contract of service must be presumed to have contemplated that, to a certain extent, fellow-servants would be employed by the master to do work in keeping the machinery safe. Work negligently done in that field, if an accident should happen from it, would seem, at first, to introduce a conflict between the obligation of the master to hold himself liable for want of due care in keeping his machinery safe, and the obligation of the servant not to claim damages resulting from the negligence of a fellow-servant. It becomes necessary, therefore, to consider the rights of the parties in such cases.

The application in each particular case of any general rule which may be laid down will involve a consideration of two questions of fact: First. What is the nature and character of the business, and the usual and proper method of conducting it? Secondly. In such a business, what is reasonably necessary to be done, on the part of the master, to secure for the use of the workman machinery and appliances which will always be reasonably safe?

First. There is that class of cases in which the condition of a machine, as to safety, is constantly changing with its use, so as to require from a person tending it, as a part of the ordinary use of it, reconstruction or adjustment of its parts, as they become worn out or displaced, from materials or new parts supplied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employees, negligence of a fellow-servant. So far as the condition of the machine depends upon this kind of attention, the master does his duty if he employs competent and suitable persons, and supplies them with everything needed for their work.

A second class of cases includes those in which repair or reconstruction of a machine is necessarily of such a kind as is commonly done, or may properly be done, under the direction of the master, by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow-servants of the employee, and he must therefore be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of the work, for the result of which, in the completed machine, the master agrees to hold himself responsible, so far as good results can be insured by his exercise of proper care. (Though this language is very indefinite, I assume it means that the servant in charge is chargeable with any defects that are due to his want of care in inspection, test, or directions, or want of skill, and which would not have happened, or would have been discovered by him, if in the exercise of ordinary care.) And so he is bound to bring to this department of his business, either in his own person or by an agent, such intelligence, skill and experience as is reasonably to be required in one to whom, in an important particular, the safety of others is intrusted; and he is also bound to be reasonably diligent and careful in the use of his faculties. One who represents him in this field is not acting as a fellow-servant with his other employees, within the meaning of the rule which we are considering, but is his agent or servant, for whose care and diligence he is accountable.

There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never reasonably have contemplated that any servants employed in the business would build or reconstruct it. A proprietor might buy such a machine or send an agent or servant to buy it. In either case the purchase would be in the line of the master's duty, and he would be liable for consequences of negligence in making it. He might have men and privileges in a machine shop in a distant city and build it there. His servants in that work would not be fellow-servants with an

employee engaged in an entirely different business, and under the doctrine of *respondet superior* he would be held liable for the consequences of their negligence. If he saw fit to construct it or reconstruct in the same way in or near the building in which it was to be used, the result would be the same. It is believed that the decisions in every case in this commonwealth founded upon alleged negligence of a master in relation to his machinery, tools or appliances will be found, upon the view of the facts taken by the court, to be governed by the principles which we have stated.¹

287. It is the duty of a railroad company to use reasonable care and diligence to keep its tracks in a safe condition for its employees to work upon. So far as keeping its tracks in repair is left to servants, it is its duty to exercise reasonable supervision to see that the work intrusted to them is properly done. How far into details this supervision must go before the domain which belongs exclusively to the master is passed, and the domain which may be left to the servants is entered, depends upon what it is reasonable to require of a master who is charged with the duty of providing safe works, machinery, tools and appliances for his employees. In some cases this may be a difficult question to decide. But undoubtedly a jury may find that a railroad corporation should so far supervise the work of its servants in repairing its tracks as to see that a pile of sleepers three or four feet wide is not left for a long time within eighteen inches of the rails in the freight yard of an important station. The condition of the road, under the circumstances shown, was evidence of negligence of the defendant corporation.²

5. The Massachusetts Statute.

(Chapter 270, Laws 1887.)

288. SECTION 1. Where, after the passage of this act, personal injury is caused to an employee, who is himself in the

¹ *Monyhan v. Hills Co.*, 146 Mass. 586.

² *Babcock v. Railway Co.*, 150 Mass. 470.

exercise of due care and diligence at the time: (1) By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; (2) by reason of negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole duty is that of superintendence; (3) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive, engine or train upon a railroad,— the employee, or, in case the injury result in death, the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of, nor in the service of, the employer, nor engaged in its work.

SEC. 2. Where an employee is instantly killed, or dies without conscious suffering, as the result of the negligence of the employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased, or, in case there is no widow, the next of kin, provided that such next of kin were, at the time of the death of such employee, dependent upon the wages of such employee for support, may maintain an action for damages therefor, and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

SEC. 3. The amount of compensation receivable under this act, in cases of personal injury, shall not exceed the sum of four thousand dollars. In case of death, compensation in lieu thereof may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or

the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death, under this act, shall be maintained, unless notice of the time, place and cause of the injury is given to the employer within thirty days and the action is commenced within one year from the occurrence of the accident causing the injury or death. (In case of his death without having given the notice and without having been for ten days, at any time after his injury, of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment.) But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury; provided, it is shown there was no intention to mislead, and that the party entitled to notice was not, in fact, misled thereby.

The words embraced within parentheses is the amendment of 1888, chapter 155 of the laws of that year.

SEC. 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, by reason of any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer, or furnished by him, and if such defect arose or had not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition.

SEC. 5. An employee or his legal representative shall not be entitled, under this act, to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed, within a reasonable time, to give, or

cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence.

(a) Decisions Under.

Cases within First Clause of Section.

289. In those cases within the words of the statute, section 1, clause 1, in which the common law gives an employee a remedy, he still has a right to sue under the same conditions and to recover damages to the same extent as if the statute had not been passed. Also, so far as section 1, clause 1, is concerned, the requirement of the notice in section 3, as a condition to maintaining actions under this act, only applies to those extremes, if any, lying outside the common-law rule but embraced by such clause of section 1, unless a case shall arise in which the plaintiff, although he has a remedy at common law, insists on relying upon the statute alone.¹

290. This clause of the statute does not give a right of action against the employer for the negligence of a fellow-servant in handling or using a machine, tool or appliance which is itself in proper condition.

This was held where one of two employees working upon a hanging staging, in painting a building, neglected to fasten securely his end of the staging, whereby it fell, causing injury to the other. It was said that this part of the statute so far changes the common law as to give a right of action to a servant who is injured by a defect in the machine, tool or appliance itself which is furnished for his use, although such defect arose from the negligence of a fellow-servant whose duty it was to see that the machine, tool or appliance was in proper condition.²

290a. An unsuitableness of "ways, works and machinery" for work intended to be done and actually done by them is

¹ Ryalls v. Mechanics Mills, 150 Mass. 190; Coughlin v. Boston Tow-boat Co., 151 Mass. 92; Clark v. Merchants' & Miners' Trans. Co., 151 Mass. 352.
² Ashley v. Hart, 147 Mass. 573.

a defect within the meaning of the statute, although they are perfect of their kind, in good repair and suitable for some work done in the employer's business, other than the work in doing which their unsuitableness causes injury. An employer cannot say that he is not in fault if his ways, works and machinery, when used as he intends them to be used, are unsuitable for his work.

The facts were that an employee was injured while engaged in moving a large pump which was loaded on a truck, it being alleged that an absence of washers on the axle was the cause of the pump falling upon him, and was evidence of negligence.¹

291. Where a declaration contains counts at common law and under the employers' liability act, presenting different issues and involving different liabilities in damages, it is within the discretion of the presiding judge to require the plaintiff to elect whether he will go to the jury on the counts at common law or those framed upon the statute.²

292. The right of an employee to maintain an action under this statute is not identical with his right to maintain an action at common law. It may be greater or it may be less. The statute provides that in certain specified cases "such employee shall have the same right of compensation, and remedies against the employer, as if the employee had not been an employee of, nor in the service of, the employer, nor engaged in its work." Sec. 1, clause 3. In other words, in the cases specified the defense of common employment with the person through whose negligence the injury was caused is taken away.

Hence, where a brakeman was injured by the nut and brake-wheel upon a brake-staff of a car coming off, such car being at the time detached from a train belonging to another company, and was at the time empty and being returned at the defendant's yard to its owner at an adjacent yard in the same place, it was held that these facts were in-

¹Geloneck v. Dean Steam Pipe Co., 165 Mass. 202.

²Brady v. Ludlow Mfg. Co., 154 Mass. 468.

sufficient to show that the car, at the time of the accident, was a part of the ways, works or machinery connected with, or used in, the business of the defendant.

It was said: The want of ownership by the defendant is not of much significance; but by the terms "ways, works or machinery connected with, or used in, the business of the employer," we understand something in the place or means, appliances or instrumentalities provided by the employer for doing or carrying on the work which is to be done. There must be a defect in something which can in some sense be said to be provided by the employer.

Without going so far as to include a car received from another road and in actual use by the defendant for the transportation of freight for which the defendant is to be paid, or a car which at the time actually forms part of a train, it seems to us that this car, under the circumstances stated, did not fall within the enumeration of the statute.¹

293. Where an employee upon defendant's train was killed while such train was on the track of another company, which it used occasionally for the purpose of transferring cars, his death having been caused, as was alleged, by a defect in the track, it was held that the occasional use by each of two railroad companies of the track of the other in delivering and taking cars in the course of business will not, to that extent, make the track of each company part of the ways, works or machinery of the other, within the meaning of the statute, and it would be unreasonable to hold that each company was bound to leave and take cars at the precise point of connection, at the peril, if it did not do so, of becoming liable for injuries resulting from any defect in the track of the other.

It was said: It may not be necessary, in order to render an employer liable for an injury occurring to an employee, within the meaning of the statute, that they should belong to him; but it should at least appear that he has control of

¹Coffee v. New York, N. H. & H. R. Co., 155 Mass. 21.

them, and that they are used in his business by his authority, express or implied.¹

294. A track owned, maintained and repaired by others than the defendant, and used by the defendant under a contract with such owners for the delivery of freight in the latter's yard, is no part of the railroad company's "ways" under this statute. And where an employee of such railroad company was killed by a defect in such track, it was held no action would lie against it. It was said: The words of the statute mean that the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right.²

295. Whether an action for the death of a person occasioned while employed in the construction of ways, works or machinery, such as a sewer, trench or building, can be maintained under this statute, was discussed but not determined. The doctrine of the English courts applied to a similar statute was stated to be that it could not; that ways and works mean the existing and completed works.

It was held, however, that recovery could not be had in the particular case, where the facts were that the employee was killed by the caving in of a trench by reason of the insufficient shoring of the sides; that sufficient material that was sound had been provided; that the shoring and bracing was under the particular charge of such employee.³

296. The liability of a bank of earth, upon which laborers employed by a person are at work, to fall, when undermined, if not shored up, cannot be said to be "a defect in the condition of the ways, works or machinery connected with, or used in, the business of the employer," when the work in the bank is simply the leveling of it for the purpose of grading the land of a third person. The statute has no application

¹ *Trask v. Old Colony R. Co. et al.*,
156 Mass. 298.

² *Engel v. New York, P. & B. R.*
Co., 160 Mass. 260.

³ *Conroy v. Clinton*, 158 Mass. 318.

to a case where such a laborer is injured under such conditions.¹

297. The plaintiff, while in the employ of the defendants, was ordered to carry a bar of iron down a flight of movable stairs leading into and intended to furnish permanent means of access to a cellar in which the defendants were making some alterations for the owners of the building. These steps had been constructed by carpenters employed by the defendants some time before, and were being used at the time by the plaintiff in carrying down the bar of iron while making the alterations in the cellar, and, as he stepped upon the stairs, they slipped, whereby he fell, resulting in his receiving injury. It was held that under such conditions they did not adopt the steps as a way used in their business, within the statute.²

298. Where an employee claimed to recover for injuries received by his hand getting crushed in exposed gearing, upon the ground that such gearing was left exposed, in violation of the statute, it was held that he could not recover under the statute because he failed to give the notice of his injury required by section 3 of the statute.

The question was whether he could recover under the common law, and it was held that he had assumed the risk.³

299. Where an employee in a mill undertook, of his own free will, to make repairs outside of his regular duties on a defective pulley and belt upon the suggestion of a fellow-workman, who had no authority over him, and with the mere consent of his own immediate superior, and he was injured after he had built a staging but before he commenced the work, while waiting for the pulley to stop, by the belt coming off, it was held that he could not maintain an action under this clause of the statute. That if it were assumed that it was intended to abolish the defense of assumed risk, and that the finding of the jury that he was in

¹ *Lynch v. Allyn*, 160 Mass. 248.

³ *Foley v. Pettee Machine Works*,

² *Regan v. Donovan et al.*, 159 149 Mass. 294.

Mass. 1.

the exercise of due care was binding upon the court, yet he assumed the risk irrespective of any implied term in his contract of service, as one not a servant, and invited upon the premises on business of the employer, would have taken the risk if he voluntarily put himself into the same situation, knowing and appreciating the danger. The statute does not put servants in a better position than that of the most favored persons who are not servants.¹

300. It is a defense to an action under this statute, for personal injuries occasioned to the plaintiff while in the defendant's employ by reason of the defective condition of the "ways, works or machinery" of the defendant, that the plaintiff, when he entered the employ, knew and fully appreciated the danger to which he was exposed. In the absence of a special contract, the statute has taken away from the defendant, in the cases mentioned in it, the defense that the injury was caused by the act of a fellow-servant of the plaintiff, but it has not taken away the defense that the plaintiff, knowing and appreciating the danger, voluntarily assumed the risk of it.

The facts were that the plaintiff, while wheeling coal in a barrow on a run in one of defendant's sheds, fell off and was injured. It was contended that the defendant was negligent in not providing guards on the runs to prevent such an accident. The plaintiff testified, and it was undisputed, that he had assisted in the same work at various times during the last fifteen years, and that the coal shed and runs had all the time remained unaltered in construction.²

301. Where a mason engaged in pointing near the windows of a room in a building was injured by the temporary staging, comprised of planks across two lime barrels, tipping, causing him to fall, and it appeared that the staging was arranged by a laborer with his consent, and that the cause of its tipping was that one of the barrels rested unsecurely upon some rubbish, it was said that the presence

¹ *Mellor v. Merchants' Mfg. Co.*,
150 Mass. 362.

² *O'Maley v. South Boston G. L.
Co.*, 158 Mass. 135.

of the rubbish on the floor could not be said to constitute a defect in the ways, works or machinery. It was merely accidental and temporary. The laborer cannot in any fair view of the statute be said to have been a person intrusted by the defendants with the duty of seeing that the ways or works were in proper condition. The statute does not apply to a mere laborer working under or with others, even though it may be a part of his duties, at some particular moment in the progress of the work, to look after and attend to certain instrumentalities.¹

302. Where an employee, while engaged in helping another employee in planing a board upon a machine, started to go to the other end of the machine, slipped or stumbled, put his hand on the machine and was hurt, and it appeared that there was an open floor in front of the machine by which he could have gone, although it was somewhat obstructed by unfinished work, but he went back of the machine instead, and his passage was somewhat obstructed by pieces of wood, forming a pile, of which plaintiff had known for two weeks, it was held that he could not recover on the ground that there was a defect in the condition of the ways, under the first section of the employers' liability act. Apart from other reasons, the obstructions were only rubbish of accidental and temporary character, which has been declared not to be within the act by *O'Connor v. Neal*, 153 Mass. 281. Nor could he recover at common law — the negligence, if any, was that of a fellow-servant.²

303. A temporary staging put up by masons in the employ of a contractor for the purpose of erecting a building on the land of a third person is not a part of the employer's ways or works within this statute. These words in the statute refer to ways or works of a permanent character, such as are connected with or used in the business of an employer; and they do not apply to a temporary structure,

¹ *O'Connor v. Neal*, 153 Mass. 281.

² *May v. Whittier Machine Co.*
154 Mass. 29.

like the staging in question, erected on the land of a third person.¹

303a. A temporary staging, put up by an employee and his fellow-servants for the purpose of being used in painting the outside of a building, is not within the term "ways, works or machinery."²

304. A staging fifteen feet high, twenty feet long and five feet wide, erected in the yard of a saw-mill by the side of a wood-pile for the purpose of enabling the workmen to pile the wood higher, and which was taken down and put up from time to time in different places, and intended to be used from four days to a week at a time in each place where it was erected, was held to be a part of the "ways, works or machinery" of the mill within the statute.³

305. If there is no defect in the material, place or construction of a staging, the presence of a stone upon it, by the falling of which personal injuries are occasioned to a workman, is not a defect in "ways, works or machinery," within the meaning of the statute.⁴

306. While workmen were engaged in raising an iron door, a wooden lever used by one of the workmen broke, whereby the door swung around, striking an iron lever held by another workman, who was in charge of the furnace, causing it to pierce his body, resulting in his death. There was no evidence that the wooden lever was defective, except that it broke, and none that it appeared to be so. It had been used a long time, but was not specially worn at the point of strain. The employer kept a stock of lumber on hand, of the proper size, and such foreman could have obtained a new lever by asking for it. It was held that the action could not be maintained. If such a stick can be said to be a part of the works or machinery, the defendant's duty to the deceased did not require it to see that he called for a

¹ *Burns v. Washburne*, 160 Mass. 457.

² *Adasken v. Gilbert*, 165 Mass. 443.

³ *Prendible v. Conn. River Mfg. Co.*, 160 Mass. 131.

⁴ *Carroll v. Willcut*, 162 Mass. 221.

proper one. It was enough that it had proper ones within convenient reach.¹

307. A car in use by a railroad company is to be considered a part of the ways, works or machinery of the company using it, within the meaning of the statute, whether such car is owned by it or by some other company.²

308. A wire which is a part of the electric signal system, used to connect the points of rails so as to insure the transmission of the electrical current, is a part of the ways, works or machinery of the railroad under the statute.³

309. An exploder made of copper covering, filled with fulminate of mercury and discharged by electricity, which is bought by the owner of a quarry to be used and instantly consumed in producing an explosion for the purpose of blasting rock, is not a part of the ways, works or machinery within the statute.⁴

310. Where a switch-tender at a draw-bridge on defendant's road was killed by a locomotive backing upon him, and it appeared some three hundred trains passed over the bridge daily; that the engine in question had no light on the tender, neither was its bell rung or whistle sounded, although it was the custom of the road that engines backing down at this point were to carry a light and to ring a bell, it was held that under this section of the act it was necessary for the plaintiff to prove that deceased himself was in the exercise of due care and diligence at the time he was killed; and as the evidence was as consistent with carelessness on his part as with his exercise of due care, in fact more so, a non-suit was proper.

It was said there was no legal duty to sound the whistle or ring the bell at this point. The employment of the deceased was such as necessarily required him to look out very carefully for coming engines and trains. There is nothing

¹Allen v. Smith Iron Co., 160 Mass. 557.

²Bowers v. Conn. River R. Co., 162 Mass. 312.

³Brouillette v. Conn. River R. Co., 162 Mass. 198.

⁴Shea v. Wellington, 163 Mass. 334.

to show what pains he took to ascertain if the engine was coming. He was upon the track when the engine came along, and the rest is left for conjecture. There is no evidence that he took such precaution as due care and diligence required of him.¹

311. Where an employee engaged in assisting to elevate and store ice in an ice-house was injured, as was alleged, by a defect in the ways and means furnished, among other things that the marker upon a cable, used to indicate when the engineer should stop the engine, was insufficient and defective, it was held that the evidence was insufficient to authorize a jury to find that his injuries were in consequence of negligence of the defendant.²

312. If all the circumstances attending an accident are in evidence, the mere absence of evidence of fault on the part of the person injured may justify an inference of due care; but where there is an entire absence of evidence as to what the person killed was doing at the time of the accident, it is not enough to show that one conjecture is more probable than another in order that his administrator or next of kin may recover. There must be some evidence to show that he was in the exercise of due care.³

313. A declaration on this clause of the statute for personal injuries to an employee, alleging that he was injured because of the falling in and upon him of a roof of the defendant's tannery, and that the condition of said tannery, and the roof thereof, was defective and unsafe, and was not remedied owing to the defendant's negligence and that of the person in his service intrusted with the duty of seeing that they were in proper condition, is sustained by proof that the failure to remove snow accumulated upon the roof was the chief cause or one of the causes of the fall thereof.⁴

¹Shea v. Boston & Maine R. Co., 156 Mass. 503; Irwin v. Alley, 158 Mass. 249.

²Carbury v. Downing, 154 Mass. 248. ⁴Dolan v. Alley et al., 153 Mass. 380.

³Tyndale v. Old Colony R. Co.,

Clause 2, Section 1.

See, also, FELLOW-SERVANTS; ALABAMA.

314. The negligence for which the statute makes the employer liable is that of a person "intrusted with and exercising superintendence." The employer is not answerable for the negligence of a person intrusted with superintendence who at the time of, and in doing the act complained of, is not exercising superintendence, but is engaged in mere manual labor or the duties of a common workman. Unless the act itself is one of direction or of oversight, tending to control others and to vary their situation or action because of his discretion, it cannot fairly be said to be one in the doing of which the person intrusted with superintendence is in the exercise thereof within the meaning of the statute.

Hence it was held where injury was occasioned a workman in the hold of a vessel which was being unloaded, by the act of the engineer, who, upon being signaled, raised a "fall" instead of lowering it, and it appeared he employed and discharged men, and employed and set the particular crew at work, that no recovery could be had under the statute. That the particular act causing the injury was not an act of superintendence. He was doing the work of a laborer, acting upon the direction of others and not directing them.¹

315. If the negligence of a superintendent is relied upon under this statute, such negligence must be shown to have occurred, not only during the superintendence, but substantially in the exercise of it.

Hence, where the facts were that an employee was told by defendant's superintendent to go to a certain hay shed and work there and store away hay, and he was injured by some bales of hay that were piled near where he was at work falling upon him, and the evidence did not disclose that the superintendent had anything to do with the piling of the hay, or that he set the plaintiff at work at the particular place where he was working at the time of his injury ;

¹Cashman v. Chase, 156 Mass. 342.

and it appeared that the superintendent had nothing to do with that particular place, that the shed itself was safe, that the place was only made dangerous by the proximity of such bales of hay, and there was no evidence that the superintendent knew or ought to have known that the hay was liable to fall, nor what was the cause of its falling, and the uncontradicted evidence showed that the hay was piled properly, it was held that a verdict was properly directed for the defendant.¹

315a. Where a carpenter was employed under a continuing contract to make from time to time such repairs and alterations on the buildings occupied by a manufacturing company as the latter required, the former to furnish his own tools and the latter the materials, the former hiring, superintending, paying and discharging the men employed in doing such work, receiving a certain sum per day for his own labor and an extra sum in addition to the wages paid the men for each man so employed, and one of the men so employed by him was injured by the act of another, it was held, in an action brought by such injured employee against the company, that the relation of employer and employee did not exist between such workman and the company.²

316. Where a truck fell through an opening in a floor upon a workman below, and the truck was constructed in such a manner that when the roller was down it could be use for moving a load, loaded upon the plank to which the roller was attached, and when the position was reversed it was intended to remain stationary, and planks or beams could be moved by resting them on the roller, and when in the latter position it could be fastened to the floor or blocked with cleats to prevent its falling; and it was contended that the implement was defective by reason of the absence of appliances for blocking or fastening it, and this was the duty of an employer or one of superintendence, it was held

¹ *Fitzgerald v. Boston & Albany R. Co.*, 156 Mass. 295.

² *Dane v. Cochrane Chemical Co.*, 164 Mass. 453.

that the absence of such appliances did not render the implement defective, and that the duty of using it in a safe manner and of blocking or fastening it was that of the ordinary workman, and not the duty of one exercising superintendence, and the plaintiff could not recover.¹

317. A quarryman in general charge of a quarry, finding that the wadding still remained in a hole which he had assisted in drilling and in loading with powder, and had attempted to discharge, negligently assumed that the charge had exploded and passed off through another hole by a connecting crevice in the rock, and, deciding to drill out the wadding, directed a fellow-workman to hold the drill while he did the striking, whereupon the charge exploded, injuring such workman. It was held that the risk of such an explosion was not one of those assumed by the workman, and that the master was liable, under this clause of the statute, for the quarryman's negligence.

As to the contention on the part of the defendant that such quarryman was in the matter acting as a servant, and was not exercising superintendence, it was said: But the plaintiff does not rely upon any negligence on the part of such quarryman in the manner of drilling the holes or of striking the drill. The negligence which the evidence tended to prove is the manner of cleaning out the hole. If such quarryman was superintendent, he was exercising superintendence in determining the manner in which the hole should be cleared out and in directing the plaintiff to assist and himself assisting in drilling it out. In that respect it was immaterial whether he himself struck the drill or ordered another person to do it.²

318. Where a brakeman was injured by reason of a defective brake on a freight car, evidence was excluded that the train of which the car had formed a part was not inspected at its arrival at a terminus, and that, as matter of custom, no inspection was made there of cars coming from the

¹O'Keefe v. Brownell et al., 156 Mass. 131.

²Malcolm v. Fuller, 152 Mass. 160.

direction from which such car had arrived. It was held that such evidence should have been admitted, as it would have a tendency to show the rules, instructions and superintendence under which the inspectors were acting, and, if it could be shown that such inspection was required for the safety of employees, a legitimate argument might be made to the jury that the rules, instructions and superintendence were insufficient to provide proper inspection.¹

319. The superintendent of the water-works of a city had, under the directions of water commissioners, the general superintendence of the outdoor work and property connected with the works. In an action against the defendant city under this statute for injuries occasioned a workman by the caving in of the sides of a trench in which he was working, it was contended on the part of the defendant that the superintendent was subject to the directions of the commissioners, and that, as neither the city nor the commissioners furnished him with materials for bracing the trench or gave him authority to procure them, he had no right so to do, and could not personally be charged with negligence, and that, as the superintendent's negligence alone was charged, the question whether the city was liable for not furnishing materials was not in issue. It was held that a superintendent may be negligent in ordering work to be commenced or continued when the proper materials or appliances are not at hand as well as in failing to use those which are at hand; that if the superintendent in question knew or had reason to know that there was danger of the caving in of the trench, and had no materials for bracing it and no power to procure them, due care required him to stop the work until suitable materials were furnished, and it was personal negligence in his work of superintendence to allow the digging to go on before the materials were procured, and that for such negligence the principal was liable.

The questions whether such superintendent was negligent

¹ *Coffee v. New York, N. H. & H. R. Co.*, 155 Mass. 21.

and that of the plaintiff's due care in working where he did were for the jury.¹

320. An ordinary weaver, whose usual work is merely to operate a loom, is not a person intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, within the meaning of the statute, merely because it is also his duty, when his loom gets out of repair, to notify the loom fixer to put it in order. The weaver and loom fixer are fellow-servants.²

321. Where a section-man while riding upon a hand-car, which car was in charge of the section foreman, was injured in collision with a wild train, and it appeared that such car was being propelled at the rate of fifteen miles an hour upon a descending grade and around a curve, and the wild train was ascending the grade at a speed of ten to twelve miles an hour, and the particular facts were such that the jury were not permitted to find the defendant negligent in sending out or in the manner of operating the train or in giving signals, it was held that the defendant could not be held liable on the ground that the hand-car was governed by the section foreman, who was a person intrusted with and exercising superintendence, and to whose negligence while superintending the accident was due.³

322. A person employed by a railroad corporation as one of a gang of workmen engaged in repairing a track, the nature of whose work requires him to bend over, with his back in the direction from which trains come, has a right to rely upon the fact that it was the foreman's duty to warn him of the approach of a train; and if by reason of the foreman's neglect to give him such warning he is struck by a train and injured, he may maintain an action against the corporation for his injury under this statute, alleging that the foreman, being a person intrusted with and exercising

¹ Connolly v. Waltham, 156 Mass. 368.

³ Shepard v. Boston & Maine R. Co., 158 Mass. 174.

² Roseback v. Ætna Mills, 158 Mass. 379.

superintendence, negligently failed to give warning of the approach of the train.¹

323. A person employed by a railroad corporation, while engaged in a stooping position in cleaning under a switch-bar in the corporation's yard, upon the tracks in which cars are being shunted, has no right so far to rely upon being warned, either by the section foreman or by a person on the car, of the approach of a shunted car, as to excuse him from using his eyes, and if, under such circumstances, he is struck by a car, receiving injuries which cause his death, no action can be maintained against the corporation, either under this statute or under Public Statutes, chapter 112, section 212, as amended by statutes of 1883, chapter 243. The case of *Davis v. Railway Co.*, 159 Mass. 532, is distinguished on the ground that in this case there is no evidence that the defendant had given the deceased the right to rely upon being warned of the approach of cars, in such a way as to excuse him from using his eyes. At the time of the accident the men were separated, and the deceased must be taken to have known that he was not relieved from the necessity of keeping watch for himself.²

324. The facts that the superintendent employed by a contractor, who is engaged in erecting a building, gives no instructions to the masons, whom he has directed to build a certain piece of wall, as to putting up a staging, and is not present when the staging is built, are not of themselves evidence of negligence on his part which will sustain an action against the contractor under this statute by a person injured while employed as a mason's tender, by the falling of the staging which is negligently built by the masons, a part of whose ordinary duties it is to build staging without special orders.³

325. Where an employee was injured by the fall of a staging upon which he was at work, and it appeared that the

¹ *Davis v. New York, N. H. & H. R. Co.*, 159 Mass. 532.

³ *Burns v. Washburn*, 160 Mass. 457.

² *Lynch v. Boston & Albany R. Co.*, 159 Mass. 536.

staging was erected in the yard of the defendant's saw-mill by the side of a wood-pile for the purpose of enabling the workmen to pile the wood higher; that the staging was built by another employee assisted by a member of the piling gang; that no one gave any orders to this gang but such workman; that he was foreman of the gang; that he sometimes worked with his hands, but worked when he pleased and did whatever work he pleased; that when he was working he was overseeing the men and giving them directions; that he placed the men at work wherever he saw fit, and that he hired workmen at different times upon their application to him for work, and two witnesses testified he had general authority over the gang of workmen, it was held that the jury would be warranted in finding that his principal duty was that of superintendence under the statute.¹

326. If an inexperienced workman, while engaged in undermining a bank of earth, is injured by the falling of the bank upon him during the temporary absence of his employer's superintendent, who testified that he understood all the time that he was looking after the bank and the men, it was held that it was negligence to allow plaintiff to work under this bank without shoring up the top of it or stationing some one to give warning.²

327. Evidence that a person was a section foreman in the employ of a railroad corporation, having the immediate charge and superintendence of a gang of five men, his duty being to take receipts, check the freight into cars and see that it was loaded in the right cars, and under whose direction the five men were working all the time in handling freight, will authorize a finding that his principal duty was that of superintendence within the statute.

Hence, where one such employee was injured while unloading a bale of burlaps from a wagon, by its falling between the wagon and the freight house, it was held it was for the jury to say whether such foreman might not have

¹ *Prendible v. Conn. Riv. Mfg. Co.*, 160 Mass. 131. ² *Lynch v. Allyn*, 160 Mass. 248.

taken some precautions to insure the safety of such employees, such as using a gang-plank which was near at hand or scotching the wheels of the wagon. While it appeared more like a pure accident, the court could not say as a matter of law that it was such.¹

328. Where the plaintiff, while in the defendant's employ, was injured by having his fingers cut off by a circular saw upon which he was put at work by the defendant's foreman, and he testified that the foreman kept himself at work pretty much all the time in getting out lumber or piling it up, or arranging it and in operating saws; and another workman testified that the foreman was the person who gave him his orders, but he did not know whether he gave orders to anybody else; that he had also seen him grinding tools, piling lumber and keeping busy generally; and that the foreman kept pretty busy at work and spent most of his time at work, it was held that the evidence did not justify a finding that the foreman was a person whose sole or principal duty was that of superintendence within the statute.²

328a. A painter was injured by the fall of a staging constructed and used for the purpose of painting the outside of a building. Three of them were working together, each receiving the same pay and doing the same work. It was claimed that the fault was that of one of them who gave directions as to the manipulating of the staging, and that he was exercising superintendence within the statute. It was held that he was not one intrusted with exercising superintendence, whose sole and principal duty was that of superintendence, within the meaning of the statute.³

329. The plaintiff, an employee of the defendant, was injured by being struck by a cement pipe which was rolled off the top of a round-house, the roof of which was being repaired by the defendant's workmen, while he, the plaintiff, was ascending a ladder leading to a staging at one side of

¹ Mahoney v. New York & N. E. R. Co., 160 Mass. 573.

³ Adasken v. Gilbert, 165 Mass. 443.

² O'Brien v. Rideout, 161 Mass. 170.

the round-house, on which he was employed. It was alleged that the injury was caused by the negligence of another employee. The latter was working with five or six other men and was paid the same price as his fellow-laborers. One Cady was the general superintendent in charge of the job; and he had often duties which took him away from the building a considerable part of the time. One Cuff was foreman under him, whose special work was with the carpenters, and who hired men and exercised superintendence more or less in the absence of the general superintendent on that part of the work where the employee whose negligence was alleged to be the cause of the injury worked. The latter received his orders from the superintendent and foreman in regard to the work to be done by himself and fellow-workmen, and gave his fellow-laborers directions in the absence of the foreman. It was held there was no evidence to warrant a finding that such workman's sole or principal duty was that of superintendence within the statute.¹

330. The plaintiff was a laborer assisting in the erection of a large building by the defendant. Some iron beams, about four and a half feet long and weighing about forty pounds each, were placed about three and a half feet from an opening in one of the floors and had been there for two or three days before the accident. The defendant's superintendent, in the exercise of his duties, was walking about the floor upon which the beams were placed, and in order to pass between a pile of planks and these beams pushed one of the beams with his foot, causing it to fall through the opening in the floor upon the plaintiff, who was at work on the floor below, injuring him. It was held the question of negligence on the part of the superintendent was for the jury. They might find it was negligence to leave the beams so near the hole that from a slight inadvertent push of the foot of a passer-by they might fall. Being left in this condition, the jury might infer a lack of due and proper superintendence. The fact that the superintendent himself hap-

¹ *Dowd v. Boston & Albany R. Co.*, 162 Mass. 185.

pened to be the person who pushed the beam with his foot is of no importance, because that was not an act of superintendence. The question is whether the moving of the beam was so likely to occur that it ought to have been provided against by the superintendent.¹

330a. A workman was injured while engaged in moving a heavy piece of timber upon a gear, the use of the appliance and the work being under the personal supervision of the defendant's superintendent, a man of large experience. It was so loaded with the narrower sides at the top and bottom, and when it commenced to tip up, such superintendent ordered the plaintiff and others to get upon it and hold it down. It was the plaintiff's first experience in transporting timber in this manner. It was held that whether the superintendent was negligent in directing the men to get on the timber and hold it down, whether the plaintiff appreciated the danger, and whether he was in the exercise of ordinary care in obeying the order, were proper questions for the jury.²

331. Where an employee was injured by the falling upon him of a large stone from a staging near which he was working, and the jury might have found that the sole or principal duty of the defendant's foreman was that of superintendence, they were rightly directed to return a verdict for the defendant, if the evidence did not justify a finding that the foreman was negligent in not discovering that the stone was so placed as to be liable to fall.

The case of *McCauley v. Norcross*, 155 Mass. 584, was distinguished. There the superintendent had occasion to visit that part of the building where the opening was. The opening there was for the use of the workmen. It is not the same thing to say that a lack of due and proper superintendence may be inferred from leaving in the same position for two or three days iron beams so placed near such an opening which workmen were expected to use, that one of

¹ *McCauley v. Norcross*, 155 Mass. 584.

² *Gagnon v. Seaconnet Mills*, 165 Mass. 221.

them would be liable, from a slight inadvertent push of the foot of a passer-by, to fall through the hole, as to say such a lack may be inferred from having a large stone upon a staging used in building one of the walls of a church, the floors of which were not in and the roof of which was not on.¹

332. An employer is not liable under this statute for the negligence of his superintendent in furnishing an employee with a defective appliance, if the employer owes no duty to his employee to have the appliance inspected in regard to its construction before use, and if it is no part of the superintendent's business to make such inspection unless he assumes so to do, with his employer's knowledge and consent, as a part of the work which, as superintendent, he is employed to do. This was said in reference to a fulminating cap.²

332a. A person must be considered as intrusted with and exercising superintendence whose sole or principal duty is that of superintendence, notwithstanding he does some slight manual labor.³

Clause 3, Section 1.

See FELLOW-SERVANTS; WISCONSIN; ALABAMA.

333. This section of the statute does not give the administrator of an employee a right of action against an employer for causing the employee's death, in addition to the right as legal representative to recover damages accruing to the intestate in his life-time. It plainly authorizes an executor or administrator to proceed in the right of his testator or intestate, and recover all damages which the deceased person suffered to the time of his death. It does not purport to make the death a substantive cause of action. It gives only the right of compensation and remedies, and it gives them to the employee, or to his legal representatives in case of his death. It implies that his representatives are merely to succeed to his rights and remedies. But

¹Carroll v. Willcut, 163 Mass.
221.

³Crowley v. Cutting et al., 165
Mass. 436.

²Shea v. Wellington, 163 Mass.
364.

the law recognizes no right of compensation for the death of a person, and gives to a deceased person no remedies founded on his death.

Section 1 of the statute is to be construed as giving a right of action to the employee, or in case of his death to his legal representatives suing in his right.

Section 2 as giving a right of action to the widow or next of kin, without indicating anything as to the mode of assessing damages; and

Section 3 as settling the amount to be recovered, first, in cases under section 1, and secondly, in cases under section 2.¹

333a. An action under the statute for causing the death of plaintiff's intestate, after a period of conscious suffering, cannot be maintained if the plaintiff fails to sustain the burden of showing that his intestate at the time he was injured was in the exercise of due care.²

334. This section, which relates to accidents that happen "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad," seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who either wholly or in part control its movements. It relates to the train or locomotive engine as a whole, and not to the individual parts which make up the train or engine.

Hence, where a brakeman was injured by reason of the breaking apart of a freight train, between two freight cars, and it was sought to bring the case within the statute by charging negligence on the part of the conductor of the switch-engine, who made up the train, in not discovering the peculiar construction of the draw-bars, it was said: There is nothing to show he was negligent in his charge or management of such a train, or of the engine attached to it, or that his conduct in reference to such a train had any con-

¹ *Ramsdell v. New York & N. E. R. Co.*, 151 Mass. 245.

² *McLean v. Chemical Paper Co.*, 165 Mass. 5.

nection with the accident. His duties were ended as soon as the train was made up. He never had charge of or control of those cars as a train, and had no charge or control of the train on which the plaintiff worked.¹

334a. An engine in a round-house for the purpose of being repaired is not on a railroad track, and is not within the statute.²

335. The provisions of this clause of the statute include, in case of a railroad corporation, every person, and must be deemed to mean any person in the service of the company who has charge or control for the time being of the train by which the employee was injured.

Hence, where a car-inspector was caught between two moving trains and injured, and it was claimed that his injuries were due to the negligence of a brakeman in charge of one of the trains, who failed to adopt the usual custom, in the proper discharge of his duty, to either slacken the speed of the train or give sufficient warning to enable the plaintiff to get out of the way, it was said: The statute obviously implies that some person is to be regarded as being in charge or control of a moving train, and makes the defendant responsible for the negligence of any person in its service who has such charge or control. It is not necessary that he should be a conductor, or have any other particular office or position. In the case before us the only persons upon the train were the engineer and the brakeman. The engineer was upon the engine and the brakeman was at the rear end of the car. There was evidence that the brakeman was there for the purpose of observing obstructions on the track, giving warning, and to stop the train if necessary. It did not appear that he was acting under the orders of any immediate superior. As between the engineer and the brakeman, under the evidence, the jury might find that the brakeman was in charge or control of the train at the time

¹Thyng v. Fitchburg R. Co., 156 Mass. 13.

²Perry v. Old Colony R. Co., 164 Mass. 296.

of the injury, and it was for him to determine whether the train should move or stop.¹

336. A locomotive and one or more cars connected together and run upon a railroad constitute a train, within this statute giving a right of action against an employer for personal injuries caused by the negligence of an employee in charge of a locomotive engine or train upon a railroad.

Hence it was held where, from the testimony, it was reasonably probable that a car which was left upon a side-track and by reason of which injury was caused to an employee engaged upon moving cars on a parallel track, that the conductor of a freight train caused it to be left there or the conductor of a switching engine; that it was for the jury to determine whether such car was so left through the negligence of a person in charge of a train.²

337. Where a brakeman upon a train was injured, and it appeared that his post of duty was at the forward end of the train, a part of his duty being to do the uncoupling there; that the conductor in his absence chained to the engine a car upon which a draw-bar was broken, and when he met such brakeman shortly afterwards told him to be at his post, but omitted to mention the broken draw-bar, and that at the next stop, during the conductor's temporary absence upon a duty connected with the proper management of the train, such brakeman, while attempting, without specific orders from the conductor and in ignorance of the danger, to uncouple such car from the engine so that the engine might assist in making up the train, was caught between the engine and the car by reason of the broken draw-bar, thus receiving his injury, it was held that whether the conductor's omission amounted to negligence on his part, which was the proximate cause of the injury, and whether the plaintiff was in the exercise of due care, were for the jury.

The conductor of a freight train may properly be found to be in charge thereof, within the statute, when a brake-

¹ *Steffe v. Old Colony R. Co.*, 156 Mass. 262.

² *Dacey v. Old Colony R. Co.*, 153 Mass. 112.

man thereon is injured because of a defect in one of the cars, although such conductor is temporarily absent upon a duty incident to the proper management of the train, and nothing is done meanwhile contrary to his orders or expectation of what would be done.¹

338. Where a car-cleaner in defendant's employ was injured by being thrown over a seat in consequence of the car in which she was working striking a bunting post with unusual force, and there was evidence tending to show that, after the train had come in and the passengers had got out, the conductor took charge of it for the purpose of distributing the cars of which it was made up to the different tracks and directed where they should be put; and the judge instructed the jury, in substance, that if the conductor had charge of the train, and the purpose was to put these cars where they were finally placed, and he carelessly directed how the engine should operate against them, and they were sent with too much force so that the brakeman could not stop them, and that was the cause of the injury, then the accident was due to the negligence of a person in charge of a train, even though at the moment when the cars struck the post they were separated. It was held the instruction was correct.²

Section 2.

339. This section relates to cases "where an employee is instantly killed or dies without conscious suffering, and in such cases gives a right of action to his widow, or if there is no widow and there are next of kin dependent on his wages for support, then to such next of kin." This section and clause 3 of section 1 are the only sections of the statute which give to anybody a right to sue. The damages to be assessed under section 3, in case of death, are those to be recovered by the widow or next of kin in a suit brought under section 2.

¹Donahoe v. Old Colony R. Co.,
153 Mass. 356.

²Devine v. Boston & Albany R.
Co., 159 Mass. 348.

Section 1 of the statute is to be construed as giving a right of action to the employee, or in case of his death to his legal representatives suing in his right; section 2 as giving a right of action to the widow or next of kin, without indicating anything as to the mode of assessing damages; and section 3 as settling the amount to be recovered, first, in cases under section 1, and secondly, in cases under section 2.¹

340. Since the passage of this statute, as well as before, an action cannot be maintained under the Public Statutes, chapter 112, section 212, as amended by the statute of 1883, chapter 243, for the death of an employee caused by the negligence of a fellow-servant.

Section 212 of chapter 112, Public Statutes, provides a remedy against a corporation, where the life of a passenger, or of a person who is in the exercise of due diligence and not a passenger or in the employment of the corporation, is lost by reason of its negligence or the unfitness or gross negligence of its servants or agents. This statute is amended by the statute of 1883, chapter 243, by adding the words, "and if an employee of such corporation, being in the exercise of due care, is killed under such circumstances as would have entitled the deceased to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee."

The purpose of the statute is to permit the administrator to maintain an action when the intestate could have maintained an action if he had recovered, and not otherwise. When his action would have been defeated by the defense of common employment, if he had sued, the action of his administrator will be barred in the same way in a suit brought on account of his death.

Section 2 of the statute of 1887 gives a right of action to the widow or next of kin where an employee is instantly killed, or dies without conscious suffering under such cir-

¹ *Ramsdell v. New York & N. E. R. Co.*, 151 Mass. 245.

cumstances as would have created a liability in his favor under the act if he had survived. The provisions of this section would be inconsistent with those of the statute of 1883, chapter 243, if that were held to include cases where the deceased might have maintained an action under the employers' liability act, if death had not resulted. It could not have been intended that where an employee is instantly killed or dies without conscious suffering, the widow or next of kin shall have a right of action for the death under the employers' liability act, and that the administrator also, by virtue of the same statute, shall be able to maintain an action for the death, which could not otherwise be maintained under the statute of 1883. Section 2 of the act of 1887, which gives a remedy to the widow or next of kin, instead of the administrator, where death results without conscious suffering, must be held to be exclusive as to cases where the aid of the statute is invoked.¹

341. Under this statute there can be but one cause of action. If there is conscious suffering, the action must be brought by the person injured, or his executor or administrator; if there is death and no conscious suffering, the action must be brought by the widow or next of kin.²

342. Under this statute, giving a right of action against an employer for the instantaneous death of an employee who leaves no widow to the "next of kin . . . dependent upon the wages of such employee for support," such next of kin in order to establish a dependency need not come within the class of persons whom the deceased, if able, was legally bound to support; the fact of dependence is sufficient.

If an unmarried employee who is instantly killed leaves as his sole next of kin a brother not dependent upon him and a sister who is dependent, an action against the employer to recover for his death under this statute should properly be brought in her name alone.

¹ *Dacey v. Old Colony R. Co.*, 153 Mass. 112.

² *Gustafsen v. Washburn & Moen Mfg. Co.*, 153 Mass. 468.

An invalid sister, unable to work regularly or to earn enough to pay her doctors' bills, who has received from a brother on an average from thirty to thirty-five dollars a month for three or four years, and who in fact receives her support from him, and is dependent upon him for support, comes within the meaning of the statute, and may maintain an action against his employer for causing his instantaneous death.¹

343. The testimony of the plaintiff, the next of kin of the deceased, who was killed while in the employ of a railroad, that she was his half-sister and had two children; that he used to come and see her and sometimes gave her money; that he sent her money every other week or so to pay her rent, and that she had no other means of support but her earnings, and since his death had had to support herself, is not sufficient to prove that she was dependent upon his wages for support, within the meaning of the statute.²

344. In an action against a railroad corporation under this statute for causing the death of a brakeman in its employ, who (no one having seen the accident) was apparently killed by his head coming in contact with a bridge while riding on the top of a tall refrigerator car attached to the rear end of the caboose of a freight train, the facts that the speed of the train was about twenty miles an hour, and the lesions upon his head were sufficient to produce instant death, that the men in the caboose, though very near him, heard no outcry, and that the defendant's workmen upon another train, who picked up the dead body, were not called as witnesses, justify the inference that he died instantly and without conscious suffering.³

345. Where an employee, while engaged in inspecting cars in the defendant's freight yard, was struck by a car, and the evidence tended to show that his body was crushed,

¹ Daley v. New Jersey, S. & I. Co., 155 Mass. 1.

³ Maher v. Boston & Albany R. Co., 158 Mass. 36.

² Hodnett v. Boston & Albany R. Co., 156 Mass. 86.

and a witness who was near him at the time of the accident testified that he was "stone dead" when the witness reached him; and he also testified that he took two or three steps after he was struck, and then fell, it was held there was evidence that he died without conscious suffering.¹

346. If a switchman, required by his duties to cross the railroad tracks, while attempting to do so in the day-time, when he knows that a locomotive engine is expected soon to pass, which could be seen approaching for a considerable distance, turns his back to the engine, without looking until just as it strikes him, he is not in the exercise of due care such as will enable his widow to maintain an action under this statute against the railroad company for causing his death.²

Section 3.

347. A notice in writing to an employer of the time, place and cause of injury occasioned to his employee, signed by a firm of attorneys, as attorneys for such employee, purports to be signed in behalf of such employee within the section of the statute, as amended by chapter 155, Laws of 1888; and in the absence of evidence to the contrary, sufficiently shows that they were authorized to sign it.

A plaintiff is not bound to ascertain and notify the defendant of all the causes to which the defect which occasioned his injury is attributed. It is sufficient if it states a cause which occurred, under such circumstances as would render the defendant responsible.³

348. A notice to a railroad company that a brakeman on a certain day was injured on the railroad within one hundred yards northerly of a station named, by being caught between a car and a locomotive engine, by reason of a broken draw-bar upon the car, which permitted the tender of the engine to run up against the end of the car and

¹ Mears v. Boston & Maine R. Co., 163 Mass. 150. ³ Dolan v. Alley et al., 153 Mass. 380.

² Sullivan v. Old Colony R. Co., 153 Mass. 118.

crush his leg, is sufficient notice of the time, place and cause of the injury.¹

349. The requirement of notice is a condition precedent to the right to bring the action. This is not held upon any nice interpretation of the particular words used, but upon a general view of what the legislature would be likely to intend.

Hence, if notice of the time, place and cause of an injury is not served until after the writ is made in an action for the injury, under the provisions of this act, although the notice is left at the defendant's house on the same day the writ is dated, the action cannot be maintained.²

350. A notice to an employer that at a time and place named his servant was instantly killed by the falling of a derrick upon him, on account of the same being improperly or insecurely fastened, sufficiently states the cause of the injury to permit a recovery under this statute.³

351. While the notices required in an action for personal injuries under this statute are not to be construed with technical strictness, enough shall appear in them to show that they are intended as the basis of a claim against the defendant and were given in behalf of the person who brings the suit.⁴

352. The notice required to be given to an employer under this section, upon the instantaneous death of an employee, may be given by his widow.⁵

353. The notice required by this section, as amended by chapter 155 of the Laws of 1888, to support an action against an employer for the instantaneous death of an employee, may be given by some one in his behalf within thirty days from the occurrence of the accident, or by the executor or administrator within thirty days after his appointment.

It was said that while adhering to the decision that the

¹ Donahoe v. Old Colony R. Co.,
153 Mass. 356.

⁴ Driscoll v. City of Fall River,
163 Mass. 105.

² Veginan v. Morse, 160 Mass. 143.

⁵ Gustafsen v. Washburn & Moen

³ Brick v. Bosworth, 162 Mass. 334. Mfg. Co., 153 Mass. 468.

notice in *Gustafsen v. Washburn & Moen Mfg. Co.*, 153 Mass. 468, given by the widow was sufficient, it seems more consistent with the probable intention of the legislature to hold also that, as an alternative, in the contingencies expressly mentioned in the statute, notice may also be given by an executor or administrator.¹

Section 4.

354. The inference from this section plainly is that the employer shall be liable, when a contractor does part of his work and an employee of the contractor is injured by reason of a defect in the condition of the ways, works, machinery or plant furnished by the employer to the contractor, which has not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition. By the negligence of the employer is meant his own negligence in distinction from that of his servant or superintendent, which is included in the latter part of the same sentence in which the negligence of the employer is spoken of.

Hence, where it appeared that the defendant had given to another charge of a certain room in his factory under an agreement by which the defendant furnished the machinery and materials, and such contractor hired and paid the men, the defendant paying him a stipulated price per case for filling the stock, and the defendant was to pay for the repairs, and the contractor had the right to order the repairs to be made, the defendant having the right to inspect the machines and being often in the room, though it was expected that the contractor would look after and clean the machines, it was held, where a workman in the employ of the contractor was injured by reason of a defect in one of the machines, in an action against the owner, that the question of the liability of the defendant under this section was for the jury.²

¹Daley v. New Jersey Steel & Iron Co., 155 Mass. 1; Jones v. Boston & Albany R. Co., 157 Mass. 51. ²Toomey v. Donovan, 158 Mass. 232.

6. Mississippi.

355. Rule in.—Where a conductor was injured by the derailment of his train, charged to the defective condition of the track, it was said: The corporation will have done all that could be reasonably required of it when it exercised circumspection and prudence in appointing employees to observe the road, make the repairs, and when it put at their disposal suitable material for the work, and when it caused suitable supervision to be had over these local employees. If a part of the road should become unsafe because of the neglect of such employees to make repairs, and should so continue for a length of time sufficient to induce the presumption that the company knew of it or ought to have known of it, then it is negligent and careless and is liable to other employees for injuries resulting therefrom.¹

7. New Jersey.

356. Rule in.—Where an employee was injured while at work in constructing a tunnel, and it was charged that his injuries were due to the negligence of the defendant in failing to provide proper means whereby the laborers and workmen, of whom the deceased was one, could be safely and securely let down from the surface of the ground through shafts into the tunnel, it was held that the laborer whose duty it was to deliver on the surface at the shaft, or there use or keep in repair, the instrumentalities provided by the defendant for the safe conduct of the laborers to and from the tunnel, was, in view of the law, a fellow-servant of the deceased, whose place of labor was in the tunnel in a common employment.²

357. The rule stated, that the master is liable to a servant for injury caused him by the personal negligence of the master; that the master's duty is the exercise of reasonable diligence and skill in respect to his appliances; yet, where

¹ Hood v. Mississippi Cent. R. Co.,
50 Miss. 178.

² McAndrews v. Burns, 39 N. J.
L. 117.

he employs competent servants to inspect and ascertain their condition, under proper instructions, his duty is performed in this respect in so far that he will not be chargeable with the negligent manner in which they perform their work.¹

358. The foregoing rule does not apply to the furnishing of appliances or premises or their construction. The master cannot claim immunity on the ground that he has exercised due care in selecting mechanics of competent skill in the construction of his appliances or buildings, but assumes the burden of seeing that such mechanics actually exercise reasonable care and skill in the execution of their work.²

8. Ohio.

359. Rule in.—It was said in respect to the duty of a railroad company in respect to maintaining its appliances in repair, that it is bound to vigilance, but vigilance is the maximum of its duty. The successful management of a railroad requires the co-operation of many servants. Reasonable care in the employment of careful and competent servants is required of the company, but the exercise of reasonable care by such servants is at the risk of his fellow-servants. Its duty in respect to its cars and appliances is to employ competent inspectors and repairers. If this is done its duty to other operatives of the road is performed.³

C. Notice Required.

360. Rule.—If a servant claims damages from the master for injuries received on account of defective premises, buildings, machinery or appliances, he must allege and prove that the unfitness or the defect was known to the master.⁴

¹Harrison v. Central R. Co., 31 Ohio St. 318; Columbus, etc. R. Co. v. Webb, 12 Ohio St. 475.
N. J. L. 293.

²Collyer v. Pennsylvania R. Co., 49 N. J. L. 59. ⁴Pittsburg, C. & S. L. R. Co. v. Adams, 105 Ind. 151; Current v.

³Railroad Co. v. Fitzpatrick, 42 Missouri Pac. R. Co., 86 Mo. 62;

361. Ohio statute.—Pursuant to the provisions of the act of April 2, 1890 (89 Ohio Laws, 149), a railroad company is chargeable with knowledge of defects in its appliances, and to overcome the effect of such knowledge the company must show that in fact it did not have such knowledge, and that it used due diligence to ascertain and remedy such defect. The presumption of diligence raised by proof of the employment of competent and careful employees will not be sufficient to overcome the effect of the knowledge of the defects which by this statute it is deemed to have.

Such defects causing injury to an employee are *prima facie* evidence of negligence on the part of such corporation. The burden is thrown upon the corporation to disprove it.¹

362. Where the action was for injury to an employee caused by the falling of a hoisting apparatus, the court laid down three propositions to be sustained in order to warrant a recovery against the master:

1. That the method of attaching the hoisting rope was defective and unsafe; that the injury was caused by the defect.

2. That the defendant knew or ought to have known of the defect.

3. That the plaintiff did not know of it and had not equal means of knowledge.

The report of the case does not contain what the proof was in respect to these several matters.²

363. Negligence on the part of the master in respect to the safety or condition of his appliances cannot be predi-

Smith v. Railway Co., 69 Mo. 32; Malone v. Hawley, 46 Cal. 409; Porter v. Railway Co., 71 Mo. 63; Brymer v. Southern Pac. R. Co., 90 Devitt v. Railway Co., 50 Mo. 302; Cal. 496. *Contra*, Branch v. Port Dale v. Railway Co., 63 Mo. 455; Royal, etc. R. Co., 35 S. C. 405. Covey v. Railway Co., 86 Mo. 635; ¹ C. H. V. & T. R. Co. v. Erick, C., C. & I. R. Co. v. Troesch, 68 Ill. 51 Ohio St. 146, 37 N. E. 128. 545; Hobbs v. Stauer, 62 Wis. 108; ² Malone v. Hawley et al., 46 Cal. Brabbitts v. Railway Co., 38 Wis. 409. 289; Devlin v. Smith, 89 N. Y. 470;

cated upon the mere fact alone that injury was occasioned by a defect therein. Knowledge of such defect on his part or that knowledge would have been obtained by the exercise of reasonable diligence on his part must affirmatively appear before negligence can be established or imputed to him.¹

363a. If it be assumed that a foreman is the *alter ego* of the master, and has knowledge of a defect in a machine, and he, on learning of the defect, directs the person who is employed for the purpose of keeping the machines in order to repair it, the failure of such employee to so repair it will not impute negligence to the foreman or the employer as regards an operative injured while using the machine. The neglect of such repairer to repair the defect after having been directed so to do is the negligence of a co-servant of the injured operative.²

363b. Where the master is informed of a defect in a machine, which he fails to have repaired, and thereafter an employee operating such machine is injured by reason, as alleged, of a defect therein substantially different, the master cannot be charged with notice, in the absence of proof that he was chargeable with knowledge of the particular defect causing the injury.³

363c. Where the superintendent of an electric street railway company was informed that one of its poles was not set firm enough in the ground and was dangerous, and its condition was not changed, and thereafter, when another superintendent had been provided and an employee directed to climb the pole, it fell while he was in the act, it was held that the company could not be heard to claim want of notice, though it did not appear the last superintendent had notice.⁴

364. Cars, coupling.—The rule was applied where the coupling of a freight car suddenly became out of repair. It

¹E. St. L. P. & P. Co. v. High-tower, 92 Ill. 139.

²Schulz v. Rohe et al., 149 N. Y. 132.

³Schulz v. Rohe et al., 149 N. Y. 132.

⁴Bland v. Shreveport Belt Ry. Co., 48 La. Ann. 1057, 20 So. 284.

was held that the railroad company would not be liable for an injury thus occasioned to an employee, unless its attention had been called to the defect, or by the exercise of a high degree of care, it could have discovered the defect and had an opportunity to make the needed repairs.¹

364a. Where the only evidence of defect was that the pin stuck in the draw-head, and it not appearing that the defendant had either actual or constructive notice of the defect, it was held error to leave the question of defendant's negligence or knowledge of the defect to the jury.²

365. Draw-bars.—The presumption is that the master has done his duty by furnishing safe and suitable appliances, and when this is overcome by positive proof that the appliances were defective, the plaintiff is met by a further presumption that the master had no notice of the defect and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured and that the injury resulted from a defect in the machinery, but it must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises.

This rule was applied where the defect claimed was a broken spring, a part of a draw-head appliance. It did not appear when it was broken, nor was there anything to indicate but that it might have been broken on the trip.³

366. Where a switchman was injured by reason of defects in a draw-bar of a car or some of its appliances, it was held that no recovery could be had where it was not shown that the defendant had knowledge of the defect, or that such defect had existed for a considerable length of time, or that it could have been discovered by the exercise of reasonable

¹ *I. B. & W. R. Co. v. Flanagan*, 77 Ill. 365. *ner*, 33 Kan. 660; *Atchison, T. & S. F. R. Co. v. Ledbetter*, 34 Kan.

² *Missouri, K. & T. R. Co. v. Thompson* (Tex. App.), 33 S. W. 718. 326, 8 Pac. 411; *Skellinger v. C. & N. W. R. Co.*, 61 Iowa, 714; *Perry*

³ *St. Louis, I. M. & S. R. Co. v. Gaines*, 46 Ark. 555. See, also, *v. Mich. Cent. R. Co. (Mich.)*, 65 N. W. 608. *Atchison, T. & S. F. R. Co. v. Wag-*

care or by tests usually employed by car inspectors, or that the car had not been properly inspected.¹

367. Where a train was inspected before starting on a trip and found to be in proper condition, yet, at a station about ten miles from where the injury occurred, a brakeman discovered that a draw-head of a flat-car was defective, and so informed the conductor, and at the next station, in attempting to work the coupling on such car by order of the conductor, he was injured by reason of such defect, and it appeared there was no workshop between the starting point and such station, it was held error to submit to the jury the question of defendant's negligence.²

368. Missing ladder.—Where it appeared that at one time a car had an appliance that was reasonably necessary for the safety of employees (a ladder), and it was removed by accident or otherwise, it was held that, before an employee could recover from the employer on account of such defect, it would have to be shown that the company or its agent had notice thereof or might have known of it by the exercise of ordinary care.³

369. Eye-bolt.—The rule was applied to an eye-bolt which was apparently sufficient, but in reality insufficient solely because of latent defects.⁴

370. Fork-handle.—And to a fork-handle, where the undisputed evidence showed that the handle appeared to be sound, but that it had a latent defect which was not observable until after the accident.⁵

371. Hammer.—Where an employee was injured by a splinter from a steel hammer he was using, and it appeared that a larger hammer was usually used for this work, but being broken the plaintiff used a small one not suited to the work, and that it was a common occurrence for chips to fly

¹ Atchison, T. & S. F. R. Co. v. Ledbetter, 34 Kan. 326, 8 Pac. 411.

² Louisville & N. R. Co. v. Law (Ky.), 21 S. W. 648.

³ Greenleaf v. Illinois Cent. R. Co., 29 Iowa, 14.

⁴ The Flowergate, 31 Fed. 762.

⁵ McAvoy v. Phil. Woolen Co., 140 Pa. St. 1, 21 Atl. 246.

from any steel hammer, it was held that there was no evidence that the unsuitableness of the hammer arose from any brittleness which was or should have been known to the defendant, and the submission of such question was error.¹

372. It was said a railroad company is not liable to an employee for injuries resulting from the breaking of a hammer, unless with knowledge of some latent defect. The fact that other hammers broke in the same work does not show negligence in selecting them.²

373. Handle to ash bag.—The rule was applied to the handle of an ash bag which broke while the bag was being hoisted full from the hold of a vessel, it being new, in which no defect had been noticed by any one.³

374. Locomotive, steps on.—While the fireman was descending from a moving engine the step turned, owing to its being loose, causing him injury. The engine had just come in from a run, during which the step had been safely used several times. The fireman had aided in securing it properly two days before, and there was nothing to show that any one had tampered with it, or that it had been accidentally injured or impaired, but immediately after the accident the step was found to be loose. It was held there was not sufficient to charge the defendant with notice or negligence.⁴

375. Ladle for carrying molten iron.—Where an employee was injured by the breaking of the handle to a ladle in which he and another were carrying molten metal, and it appeared that it had been used for the same purpose for fifteen years, no evidence appearing as to its condition at the time of the accident, it was held that as it did not appear that there was any obvious defect, or one which the defend-

¹ H. S. Hopkins Bridge Co. v. Burnett, 85 Tex. 16, 19 S. W. 886.

² Georgia R. & B. Co. v. Nelms, 83 Ga. 70, 9 S. E. 1049.

³ The France, 59 Fed. 479, reversing Same Case, 53 Fed. 843.

⁴ Texas & P. R. Co. v. Patton, 61 Fed. 259 (C. C. A.). See, however, McDonald v. Mich. Cent. R. Co. (Mich.), 65 N. W. 597.

ant would have discovered by the exercise of due care, the direction of a verdict for the defendant was proper.¹

376. Rails.—The rule was applied to a rail claimed to be defective by reason of being worn and splintered, where an employee was injured by such splintered part catching his clothing. It was said that it must be shown that the rail was so defective when put in place, or, if it afterwards became worn, that the company knew of its defective and dangerous condition, or that it was defective and dangerous for such a length of time that the company might and ought to have known of it by the exercise of reasonable attention, care and diligence.²

377. Where a similar accident from like cause was occasioned an employee, it was said that liability for an accident from such a cause is not established unless it is shown that the defendant had notice of the defect, or that in the exercise of reasonable care the defendant should have known of it and that it was dangerous. It was held competent for the defendant to show by experienced witnesses that such accidents have been unknown.³

378. Steam pipe — Manner of adjustment.—While workmen were engaged in taking apart a steam feed pipe in a mill, it was discovered that originally it had not been put together in a proper manner, that is, the end of the pipe had been screwed into the cylinder only to the extent of a thread and a half. The pipe had safely served its purpose for many months. In the attempt to separate the pipe from the cylinder it gave way, causing injury to one of the workmen. It was held that the master was not responsible for the consequences of the pipe not being properly attached to the cylinder, unless he knew of the defect; that there was nothing to suggest to him its existence.⁴

379. Switch lock.—In an action by an employee to recover for injuries resulting from the defective condition of

¹ Reilly v. Campbell et al., 59 Fed. 990 (C. C. A.). ever, Paine v. Railway Co., 91 Wis. 340, 64 N. W. 1005.

² Pittsburg, C. & St. L. R. Co. v. Adams, 105 Ind. 151. See, how- ³ Doyle v. St. P. & M. R. Co., 42 Minn. 79, 43 N. W. 787.

⁴ Hobbs v. Stauer, 62 Wis. 108.

the lock of a switch, it was said that he must show by a preponderance of evidence that the company knew of the condition of the lock, or by the exercise of ordinary care might have known of it.¹

380. Exceptions — Brake-chains.— Where it was found that a defect existed in a brake-chain at the time it was placed upon the car, it was held that the law did not require that notice of the defect should be shown to have been possessed by the company.²

381. Step-ladder.— Where the cause of injury to an employee was alleged to be a defect in the construction of a step-ladder, in that the nails used were too small, it was said that, having manufactured and supplied the ladder, the appellant was chargeable with such knowledge of its defects as ordinary care during such manufacture would have discovered. The manner of construction and the opportunities for the company through its manufacturing agents to discover defects were questions for the jury, and from which to pass upon the existence of knowledge in fact or of such facts as would charge knowledge.³

382. Tender.— Where there was nothing in the appearance of a wrecked tender lying on its side to indicate that the bottom had torn loose from the body, and that ordinary diligence on the part of the section boss and road-master would have discovered it, no liability on the part of the company appeared for injuries sustained by a section-hand by the bottom of the tender falling upon him.⁴

1. Danger Unknown and Not Reasonably Anticipated from Defects.

See CONCURRING NEGLIGENCE and PROXIMATE CAUSE.

384. Rule.— A master is not liable to his servants for injuries caused by known defects, unless they were such as by

¹Ohio & M. R. Co. v. Heaton, 137 Ind. 1, 35 N. E. 687.

²Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423, 46 N. W. 111.

³Standard Oil Co. v. Bowker, 141 Ind. 12, 40 N. E. 128.

⁴Skidmore v. West Virginia & P. R. Co. (W. Va.), 23 S. E. 713.

the exercise of reasonable skill he might have known to be dangerous.

An accident that cannot be reasonably anticipated by either of the parties, when it occurs without fault of the person charged with it, is not actionable.¹

385. Car — Absence of jaw-strap.— Where it appeared that employees were in the habit of using jaw-straps on cars in mounting them, though their use was properly to strengthen the car, and the company had notice of such custom, and that the jaw-strap on the particular car in question had been missing for some time, it was held a proper question for the jury whether the company ought not to have anticipated that employees would rely upon the jaw-straps being present in performing their duties.²

386. Machine in saw-mill.— The rule was applied to the condition of a machine in a saw-mill which was not considered dangerous by reason of the particular defect.³

387. Rail, splintered.— Also to a splintered rail. Where an employee was injured by his foot being caught in the splinter, it was said that to establish negligence from such a cause it must appear that the defendant was not only chargeable with knowledge of the defect, but chargeable with knowledge that it was dangerous. That it was competent for him to show by experienced witnesses that such accidents have been unknown.⁴

388. Maul.— The master's duty is the exercise of reasonable diligence, so as to make it reasonably probable that injury will not occur in the use of tools.

This was said where an employee was injured by a piece

¹Trinity County Lumber Co. v. Dunham, 85 Tex. 56, 19 S. W. 1012; Morris v. Gleason, 1 Ill. App. 510; Bibby v. Wausau Lumber Co., 80 Wis. 367; Doyle v. St. P. & M. R. Co., 42 Minn. 82, 43 N. W. 787; McNally v. Savannah, F. & W. R. Co., 86 Ga. 262, 12 S. E. 351; Finalyson v. Utica M. & M. Co., 67 Fed. 507.

²Coates v. Boston & M. R. Co., 153 Mass. 297, 26 N. E. 864.

³Trinity County Lumber Co. v. Dunham, 85 Tex. 56, 19 S. W. 1012; Bibby v. Wausau Lumber Co., 80 Wis. 367.

⁴Doyle v. St. P. & M. R. Co., 42 Minn. 79, 43 N. W. 787.

of the face of an ordinary iron maul, used in driving spikes, breaking off from the battered surface of such maul, and striking him in the eye. It was further said: It cannot reasonably be contended that a tool or implement which is worn and defective from use, but which still answers its purpose, should be cast aside as dangerous, unless there is some apparent cause of danger in its continued use.¹

389. Where the employee was injured by using a maul, alleged to be defective in this, that it had a cracked and crooked handle, and was badly worn and battered; that it was uneven on the surface, by reason of which defects, when a blow was struck with it by such employee, it was caused to glance and rebound in such a way as to jerk such employee from the top of a bridge, causing him to fall, it was held that the question of defendant's negligence in furnishing him a defective tool, and that he had knowledge of such defect, was properly submitted to the jury, and that a recovery by the plaintiff would not be disturbed.

(It must have appeared that the employee using the implement, it being a common and ordinary tool and not a dangerous appliance, had equal or better means of knowing of the defects and danger than any one who represented the master.)²

390. Swage.— Where an employee who had gone to the shop to get a bolt needed in his work was injured by reason of a flake of iron flying from a swage which had become battered and burred striking him in the eye, it was held there was no evidence of negligence on the part of the master. It was said by the court: We are satisfied that the injury was the result of a mere accident, a thing not reasonably expected — a rare and peculiar accident.³

¹ Little Rock & Fort Smith R. Co. v. Duffy, 35 Ark. 602.

³ McNally v. Savannah, F. & W. R. Co., 86 Ga. 262, 12 S. E. 351.

² Chicago, K. & W. R. Co. v. Blevins, 46 Kan. 370, 26 Pac. 687.

D. Notice, Proof of.

See INSPECTION.

391. Rule.—The liability of an employer for defective machinery does not depend on the fact that the defects are latent and unknown, but depends on the question of proper care in selecting the machinery and keeping it in repair. If the employer has been careless or reckless in the purchase or fitting up of the machinery, or if its defects could have been discovered by the exercise of reasonable care, either in the purchase or afterwards, the fact that they were unknown will not and ought not of itself shield the employer.¹

392. The servant takes upon himself the burden of showing that the master had notice of the defect complained of, or, in the exercise of that ordinary care which he is bound to observe, he would have known of it. Knowledge of such defect must be brought home to the company, or it must be proven that it was ignorant of the same through its negligence or want of care.

This was said where the defect alleged was that the spring on the draw-head of a car was short, weak and defective, and a large hole had worn in a dead block, which it was urged might have been observed by proper inspection.

This case also holds that the burden is on the employee to show want of knowledge or equal means of knowledge on his part; but the courts are divided on this question.²

1. Accident, Prior from Same Cause.

393. It was held that evidence showing that the apparatus had fallen before from a similar cause was admissible to show knowledge of the defect on the part of the defendant. It was said that this proposition is clearly distinguishable from that where it is sought to show a similar accident as proof of the defect itself. The latter is improper.³

¹ *Gunter v. Graniteville Mfg. Co.*,
18 S. C. 262.

² *Johnson v. Chesapeake & Ohio
R. Co.*, 36 W. Va. 73, 14 S. E. 432.

³ *Malone v. Hawley*, 46 Cal. 409.

394. Where an employee was injured through defects in the construction of a car used for conveying stone in defendant's stone mill, evidence that another had been previously injured through the same defects was held to be admissible to show notice of the defect.¹

395. Chain.—Where a chain attached to a jack screw, used for many years as the means of drawing down the springs of locomotives, broke by reason of the want of strength to bear the strain, and it appeared that it had broken before while being similarly used, it was held that the negligence of the master sufficiently appeared.²

396. Coupling.—Where the evidence showed that the draw-bolt supplied by the railroad company to be used in coupling cars was used on two occasions, working well on the first, but failing to work on the second, although twice tried in a proper manner, it was held that the jury might, in the absence of any inspection by the company, infer that the implement was defective.³

397. Draw-head.—It was said, as between a railroad company and its employees, the railroad company is not necessarily negligent in the use of defective machinery not obviously defective; but it is negligent in such cases only when it has notice of the defects or where it has failed to exercise reasonable and ordinary diligence in discovering them and remedying them; and proof of a single defective or imperfect operation of any such machinery or instrumentalities, resulting in injury, will not of itself be sufficient evidence, or any evidence that the company had previous knowledge or notice of any supposed or alleged defect, imperfection or insufficiency in such appliances.

This was said where an employee was injured while engaged in coupling cars by reason of the spring in a draw-

¹Salem Stone & Lime Co. v. Griffin, 139 Ind. 141, 38 N. E. 411. ³Ousley v. Central R. & B. Co., 86 Ga. 538, 12 S. E. 238.

²Krogstad v. Northern Pac. R. Co., 46 Minn. 18, 48 N. W. 409.

head being defective, but the defect had not before been discovered.¹

398. Electric car.— Where a motorman upon an electric car was killed by the car “bucking” and throwing him over the dashboard, and he was run over and injured by the car, and it was claimed that the cause was the wornout condition of one of the electric fields, and it appeared that the car had frequently “bucked” before, to the knowledge of those to whom the defendant had intrusted the duty of seeing to the condition of its cars, it was held that there was sufficient to warrant a finding of notice and negligence on the part of the defendant.²

399. Elevator.— The fact appearing that an elevator was old, fitted with an old rope, which had once parted, and that twice before the elevator had fallen, it was held presented the question of the master’s negligence as one for the jury.³

399a. Where an employee was injured by a truck breaking through the floor of a mill, and it appeared that two days before a truck had broken through, and a portion of the plank had been removed, and that it was the same plank that broke the second time at another place, and there was evidence that the whole plank was rotten, it was held that a verdict for the plaintiff would not be disturbed.⁴

400. Locomotive.— Where the alleged cause of injury to a brakeman was a defect in the reverse lever upon a locomotive, whereby the motion of the engine was changed against the will of the engineer, and the question was presented whether the accident was attributable to such cause or the negligence of the engineer, and it appearing by the testimony of a witness that the same conditions had existed on two other occasions, and that the locomotive had been overhauled in the defendant’s shop, it was held that

¹ Atchison, T. & S. F. R. Co. v. Wagner, 33 Kan. 660, 7 Pac. 204; ³ Bier v. Standard Mfg. Co., 130 Pa. St. 446.

Skellinger v. C. & N. W. R. Co., 61 Iowa, 714. ⁴ Johnson v. Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac. 370.

² Beardsley v. Minneapolis St. R. Co., 54 Minn. 504, 56 N. W. 176.

the question thus presented was properly submitted to the jury.¹

400a. Mines.—Where an employee was injured while working in a mine by a piece of loose rock falling upon him, it was held not competent for the defendant to show that no accident had ever before happened in the mine. That there were too many uncertain and undetermined elements which might affect the safety of the workmen to make the testimony valuable or proper.²

2. From Length of Time.

401. Notice or knowledge of defects in appliances may be presumed from the length of time they have existed.³

401a. Where an employee in a brewery was injured by an explosion caused by pitch, which was being heated, leaking from a kettle used, and there was no proof of actual notice on the part of the master of such defect in the kettle, it was held it was proper for the jury to impute notice to the master from the length of time the defect had existed, and applied the rule that it was the duty of the master not only to provide reasonably safe appliances in the first place, but to examine and inspect them from time to time and use ordinary skill to discover and repair defects in them.⁴

402. If there is a defect in the appliances which has existed so long or is of such a character that the master, by the exercise of ordinary care, would have discovered it, he is liable for an injury sustained by the employee in consequence of such defect, to the same extent as though he had actual knowledge thereof.⁵

403. Appliance for unloading grain.—Where an employee was injured by means of certain appliances furnished for use in unloading grain from a car into elevator bins,

¹ *Burlington & M. R. R. Co. v. Wallace*, 28 Neb. 179, 44 N. W. 223.

³ *C., B. & Q. R. Co. v. Avery*, 109 Ill. 314.

² *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71.

⁴ *Stapf v. Brewery Co.*, 37 N. Y. S. 256 (1st Div.).

For other cases see EVIDENCE.

⁵ *Wedgwood v. C. & N. W. R. Co.*, 44 Wis. 44.

which appliance was out of order and did not work promptly, and it appeared the same difficulty had been experienced for some time before, occasionally, it was held that such appliance was defective, and the defect had existed for such length of time as to charge the employer with notice thereof. What the particular defect was, and why the appliance did not work promptly, did not appear, and, so far as the evidence disclosed, was unaccountable.¹

404. Blocking of frog.—An employee was injured by reason of a defective blocking in a frog. The defect consisted in the blocking becoming worn from use. It was said that proof of actual notice of the condition of the blocking was not required. That the company owed a duty of careful and vigilant inspection to discover defects. When the plaintiff had introduced evidence tending to show that the blocking in question had become defective by wear, so as to be no longer efficient to obviate the danger of catching the foot of the employee, he showed enough to take to the jury the question as to whether the defendant had performed its duty of inspection and repair of its tracks. Were the testimony such as to show a sudden break from a hidden defect, the question would be different.²

405. Cars.—The mere fact that a car, which was the cause of an employee's injury, was in an unsafe and dangerous condition, is not *prima facie* evidence of negligence on the part of the employer. To warrant a jury in finding negligence, the evidence should show that the employer had previous knowledge of the condition of the car or ought to have had such knowledge, and failed to repair the defect within a reasonable time.

To warrant an inference of negligence on the part of the employer, there must be proof of the existence of the defect some time prior to the accident, or of a failure to properly inspect.³

¹Radman v. C., M. & St. P. R. Co.,
78 Wis. 22.

³Mensch v. Pennsylvania R. Co.,
150 Pa. St. 598.

²Paine v. Eastern Ry. Co. of Min-
nesota, 91 Wis. 340, 64 N. W. 1005.

406. Brake.—It was said that the mere fact of the accident is not enough to establish negligence. There must be additional and affirmative proof of the particular negligence which caused the accident. It is not enough to show that the defect existed at the moment of the accident. It must also appear that the master had an opportunity of previous knowledge, or that the facts were such that he ought to have known of the defect.

This rule was applied where the evidence was only to the effect that the brake was out of order at the time of the accident, and that a brakeman was thereby unable to control the car.¹

407. Brake-staff — Absence of nut.—It was held that a railroad company was chargeable with knowledge of the defect in a brake-staff, an absence of the nut which held the wheel on to the staff, where the rusted appearance of the thread on the end of the staff indicated that it had been off for several weeks, even though it appeared that the car had been inspected by one of its inspectors immediately prior to the wheel coming off, while used by an employee who failed to discover the defect.²

408. Coupling.—Where a coupling pin was worn, rusted and cracked, which was the alleged cause of injury, it was said: The master's duty is a continuing one, and requires him to keep a constant supervision over appliances, and to exercise at least ordinary care to maintain them in such condition as will make their use safe.³

409. Draw-bars.—Where an employee was injured while coupling cars, one of which had a draw-bar with the end so battered as to leave a sharp ragged edge liable to catch the clothing of a person so engaged, it was held that a question as to the defendant's negligence was presented for the jury.⁴

¹ *Mixer v. Imperial Coal Co.*, 152 Pa. St. 395.

³ *L. E. & St. L. C. R. Co. v. Utz*, 133 Ind. 265.

² *Chicago & E. I. R. Co. v. Kneir*, 152 Ill. 458, 39 N. E. 324.

⁴ *McKnight v. C., M. & St. P. R. Co.*, 44 Minn. 141.

410. Hand-hold.—Where the employee was injured by the breaking of a hand-hold upon a car while he was descending from the top of the car, and it appeared that the car was an old one, and that the nut was gone from the bolt which secured the hand-hold, and the end of the bolt was rusted over, it was said that the evidence as to these conditions presented a question bearing upon the length of time the defect existed.¹

411. Where a conductor of the defendant's train was killed while ascending a car, caused, as was alleged, by the absence of a handle at the top of the ladder, which had been broken off, and its appearance indicated an old break, it was held that the neglect of the defendant sufficiently appeared to justify a verdict against it.²

412. Jaw-strap, absence of.—Where the employee was injured in an attempt to mount a car by putting his foot into the jaw-strap, and it appeared that the jaw-strap was only intended to strengthen the car, and that it was missing on this particular car and had been for some time, and the company had notice that employees were in the habit of using such jaw-straps in mounting coal cars, it was held a proper question for the jury whether they ought not to have anticipated that employees would rely upon jaw-straps being present in performing their duties.³

413. Hook.—It was said in reference to a hook which was used to lower cotton into the hold of a vessel, it is clear that the defect might of itself have indicated that the master should have known of it. Its patent and obvious character and the apparent age of the defect may indicate this. The master being under the duty not only to furnish safe and suitable implements to his employees, but to keep them in that condition, is bound to know the condition of his property so far as proper inspection will enable him to know

¹ Louisville N. R. Co. v. Pearson,
97 Ala. 207, 12 So. 176.

³ Coates v. Boston & W. R. Co.,
153 Mass. 297, 26 N. E. 864.

² Richmond & D. R. Co. v. Moores,
Adm'r, 78 Va. 93.

it. And where it is proved that there was a defect, and that the defect was obvious, and on its face showed that it had existed long enough before the injury to have been discovered by the master in the exercise of ordinary diligence, it is at once apparent, if the master did not know of it, he might have known, and that he failed in his duty to inspect and know. *Railway Co. v. Nelms*, 83 Ga. 71, distinguished. In that case the defect was latent, in this it was obvious.¹

414. Locomotive.—Where there was evidence tending to show that an engine which exploded was inferior and weak, was frequently and from necessity taken to the repair shop for repairs, that it was unable to hold water or sustain a full head of steam, it was held that the question of defendant's negligence was one of fact for the jury.²

415. Where a locomotive wheel was defective and the defect had existed for a considerable time and was open to observation, it was held that such conditions tended to support an allegation of defendant's knowledge of the defect.³

416. Nut on machine, absence of.—In an action against the master, caused by the absence of a nut which held certain machinery in place, where it appeared that the nut had been missing for two weeks, it was held that this was sufficient to charge the master with notice of the defect.⁴

417. Wire holding chain.—Where an employee was injured while at work repairing a sliding door, from its falling, caused by the breaking of the wire, which was old and rusty, used to hold the chain by which the door was suspended, and it appeared that the chain had not been examined or inspected for eight years, it was held that the question of the employer's negligence was a proper one for the jury.⁵

¹ *Ocean Steamship Co. v. Mathews*, 86 Ga. 418, 12 S. E. 632.

² *Kirkpatrick v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 240.

³ *Bridges v. St. L., I. M. & S. R. Co.*, 6 Mo. App. 389.

⁴ *Monmouth Mining & Mfg. Co. v. Erling*, 148 Ill. 521, 36 N. E. 117.

⁵ *Tangney v. J. B. Wilson & Co.*, 87 Mich. 453, 49 N. W. 666.

For other cases, see INSPECTION.

3. From Failure to Discover.

418. Cars, brake-beam.—Where a bolt became displaced upon a brake-beam of a car, causing injury to an employee, it was held that whether this condition of the bolt constituted a defect, and also whether the defendant was, in view of the condition of the beam — the defect, if such, being obvious and patent — chargeable with negligence in not discovering it, were properly questions for the jury.¹

419. Brake-rod.—Where, after an accident caused by the breaking of a brake-rod, it was discovered that there existed an old crack or flaw which weakened it, and the evidence on the part of the company was to the effect that such defect was not discovered upon the application of practical tests, which had been systematically made, it was held there was nothing upon which a finding of negligence could be predicated.²

420. Yet, where an injury was occasioned an employee from the breaking of a defective brake-rod, the defect consisting of a crack or flaw more than half way through, which defect was apparent upon examination of the broken end, a finding that the defect could have been discovered by a proper and ordinary inspection was sustained. The liability of the company was adjudged on the ground of negligence in not discovering it.³

420a. A brakeman was injured by the breaking of a defective brake-rod. There was an old crack or flaw at the point of breaking, but this point was so located that it could not be detected without taking out the rod pin and elevating the rod several inches. It appeared, however, that the car was old, the paint was faded, timbers and flooring cracked and worn and the siding was badly worn. It was held that the question of the exercise of reasonable care and

¹ Wedgwood v. C. & N. W. R. Co.,
44 Wis. 44, 41 Wis. 478.

³ Cowan, Adm'r, v. C., M. & St. P.
R. Co., 80 Wis. 284

² Smith v. C., M. & St. P. R. Co.,
42 Wis. 520.

caution in placing this car in the train was a question for the jury.¹

421. Hand-hold.—A conductor was killed in falling from his train. The plaintiff's theory was, that in descending from a high car he caught hold of a hand-hold, which gave way from being insecurely fastened, and he was thus thrown upon the track. From the manner of his injuries another theory was equally probable, at least it was inconsistent with the one advanced by the plaintiff. The hand-hold, after the accident, was found to be detached at one end, the screw which held it being loose from the wire and the wood. The company had a number of inspectors at the station from which the car had just left, and several were at other points, whose duties were to examine all cars going out and see if they were in good condition. Whether this particular car was so examined did not appear.

It was said: The screw may have suddenly pulled out of the wood by reason of the slight decay around it and under the end of the fastening of the iron rod. But this is speculation merely. If it had been shown that the rod was loose or out of order, or the wood so decayed at the place of fastening as to render it unsafe, and this was discoverable by ordinary inspection at Horton or at the North Topeka round-house, then it would be a matter for the jury to determine whether the defect was known, or by the exercise of ordinary care ought to have been known by the defendant in time to remedy or call attention of employees to it before the occurrence of the casualty. But in the absence of any such proof the trial court was justified in sustaining a demurrer to the evidence.²

422. A railroad company is bound to furnish and keep in repair proper hand-holds on the end of box-cars for the support of brakemen, and it is negligence to send out a car the hand-hold on which is so bent that it can only be grasped at the ends. The duty of the defendant required the exer-

¹ Campbell v. Louisville & N. R. Co. (Ala.), 19 So. 975.

² Carruthers v. C., R. I. & P. R. Co., 55 Kan. 600, 40 Pac. 915.

cise of reasonable care in this respect. Its condition was obvious to one making the most casual inspection. It was a disregard of duty amounting to negligence to send out a car in such defective condition.¹

423. Ladders on.—Where a brakeman was injured by a defective ladder upon one of the defendant's cars, though the defect was not visible, it was held the company was chargeable with notice of such defect, because it appeared it could have ascertained it by making proper inspection and test.²

424. Where an employee was injured by a defect in the ladder of a car, it was held the company was not liable. The apparent conflict between the decision in this case and that in the case of *T., W. & W. R. Co. v. Ingraham*, 77 Ill. 309, where the company was held liable for a similar defect, was explained. It was said that in the present case there was no evidence from which it could be inferred that the company knew, or had reason to know, the ladder was defective.³

425. Coal.—Where a railroad company furnished for use of one of its engines inferior coal, which caused flames to burst out of the door and injure the fireman, and it appeared that the company might have known by the exercise of reasonable diligence the character of the coal, and the fireman did not know the danger attending its use, it was held that the company was liable.⁴

426. Hand-car, handle on.—Where the defect complained of was the handle of a hand-car, and the evidence tended to show that there was a knot near where it broke, and that the grain of the wood was not straight, and that there was a nail hole extending through the wood, it was said that the only question of serious doubt or difficulty is whether the defendant was negligent in permitting such a

¹ *Settle v. St. Louis & S. F. R. Co.*, 127 Mo. 336, 30 S. W. 125.

² *T., W. & W. R. Co. v. Ingraham*, 77 Ill. 309.

³ *Chicago & Alton R. Co. v. Platt*, 89 Ill. 141.

⁴ *Missouri, K. & T. R. Co. v. Walker* (Tex. App.), 26 S. W. 513.

piece of wood to be used for a car handle, or in suffering it to be in use so long. The nature of the business and the danger attending the use of the car required a corresponding degree of care on the part of the defendant in guarding against accident from defects in the same. It was held that the question of defendant's negligence was for the jury.¹

427. Locomotive.— Where an accident was occasioned by the bursting of a cylinder of an engine, and it was disclosed that there was an old crack in such cylinder, and a witness testified that he had not observed it was cracked, but had noticed there was a click of the piston several times, and had called it to the attention of one presumedly (but the case does not disclose) with authority and stated there was something wrong in the cylinder, it was held that such evidence was proper as tending to show that the defendant ought to have known of the actual defect.²

428. Pile-driver.— Where a pile-driver was so defectively constructed that the wire rope for lifting the hammer would drop out of a pulley over which it should run, whereby it became ragged, and catching the mitten of an employee drew his hand under the pulley, and it appeared that the apparatus was new and that the defect was partially remedied on the first day, it was said, in view of the defective operation of the apparatus the first day of its use, it was a fair question for the jury as to whether the master, through the foreman in charge of the work, ought not to have discovered that the wire rope had become broken and was a dangerous object to touch with a mittened hand when liable to be set in motion without warning.³

429. Push-pole.— The use of a push-pole for pushing cars upon a track running parallel with the engine, which was cross-grained and defective, where the tender lacked the usual socket in which to place the end of the pole for operation, was said to constitute such negligence as to warrant a

¹ *Anderson v. Minn. & N. W. R. Co.*, 39 Minn. 523.

³ *Steen v. St. Paul & D. R. Co.*, 37 Minn. 310, 34 N. W. 113.

² *Howard Oil Co. v. Davis*, 76 Tex. 630, 13 S. W. 665.

finding that the defendant was liable to an employee for injuries he sustained by reason of such pole slipping and breaking.¹

430. Step-ladder.—Where the cause of injury to an employee was alleged to be a defect in the construction of a step-ladder, in that the nails used were too small, it was said, having manufactured and supplied the ladder, the appellant was chargeable with such knowledge of its defects as ordinary care during such manufacture would have discovered. The manner of construction and the opportunities for the company through its manufacturing agents to discover defects were questions for the jury, and from which to pass upon the existence of knowledge in fact or of such facts as would charge knowledge.²

431. Water valve.—In an action by an employee for damages for injuries caused by the bursting of a water valve, the evidence was that the appearance of the valve did not indicate to one without special knowledge that the valve was defective, and there was no evidence that defendant possessed that special knowledge, nor any evidence inconsistent with the supposition that the valve had been properly tested before defendant accepted it. It was held that the burden being on plaintiff to show that the defendant knew, or by proper care might have known, that the valve was unsafe, a nonsuit was proper.³

4. From Knowledge of Agent or Servant.

432. Rule.—To make notice of defects in appliances effective, it should be given to the master or to some one who had the power or whose duty it was to make the repairs.⁴

¹ *Norfolk & W. R. Co. v. Jackson* (Va.), 6 S. E. 220.

² *Standard Oil Co. v. Bowker*, 141 Ind. 12, 40 N. E. 128.

³ *Deane v. Roaring Fork E. L. & P. Co.*, 5 Colo. 521, 39 Pac. 346.

For other cases see *INSPECTION*.

⁴ *Richardson v. Cooper*, 88 Ill. 270.

432a. Where the employee whose duty it is to repair appliances knows, or in the exercise of reasonable care ought to know, of defects therein, his neglect is chargeable to the master.¹

433. Notwithstanding the statute, the knowledge or notice, act or omission for which a master is responsible must be that of some agent or employee having authority or duty in the premises.²

434. Where knowledge or notice is brought home to an agent who has no duty or authority in the premises, the corporation cannot be charged with such knowledge or notice, or held liable for negligence in failing to act thereon.³

434a. Where a machinist in an establishment is employed and charged with the duty of keeping the machinery in repair, knowledge that he may have of defects in such machinery is notice to his employer, where another employee is injured by reason of the existence of such defect.⁴

434b. Knowledge of defects in appliances in order to be imputed to the employer must be of those servants whose duty it is to see that the appliances were kept in a safe condition.⁵

434c. It makes no difference what the grade of such a servant is so long as his duty is to have repairs made.⁶

435. Where the question was as to the employer's knowledge of defects in a bridge which caused injury to one of his servants, it was said a railroad company would be chargeable with negligence if any of its employees whose duty it was to observe the condition of the bridge or keep it in repair had actual or implied notice of defects therein, or in the exercise of reasonable diligence would have known of

¹ *Texas & Pacific R. Co. v. Thompson*, 71 Fed. 531.

² *Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657.

³ *Solomon R. Co. v. Jones*, 30 Ark. 601.

⁴ *Fox v. Le Comte*, 37 N. Y. S. 316, 2 App. Div. 61.

⁵ *St. Louis & S. W. R. Co. v. Threat* (Tex. App.), 34 S. W. 152.

⁶ *Chapman v. Southern Pac. Co.* (Utah), 41 Pac. 551.

them, and failed to make necessary repairs. This conclusion is placed upon the statute code, section 1307.¹

436. Complaint of a defective railroad crossing made to one who has no charge or control of the same, though he be a servant of the company, was held not to be notice of the defect to the company.

The case fails to show what particular agent or servant was thus informed.²

437. Employee appointed to convey messages.— Where the plaintiff, who was a conductor upon a street-car, alleged that he was injured by making unusual exertion to stop a car by applying the brake, which for some reason not ascertained failed to act properly, in the forenoon of the day of the accident, and had sent notice to the power-house of such defect by an employee who had been appointed by the defendant to carry such messages, it was held that the evidence was sufficient to warrant a finding that the defendant had notice of the defect and was negligent in permitting the use of such car after such notice.³

438. Engineer, of defects in his engine.— When a railroad company makes no provision for inspection of locomotives except by engineers, and an accident occurs to a brakeman from a defective push-bar on an engine known to the engineer before starting on the trip, it is a question for the jury whether the engineer does not occupy such relation to the company that notice to him is notice to the company.⁴

¹ *Locke v. S. C. & P. R. Co.*, 46 Iowa, 109.

² *Union Pac. R. Co. v. Springsteen*, 41 Kan. 724, 21 Pac. 774.

³ *Newhart v. St. Paul City R. Co.*, 51 Minn. 421, 52 N. W. 983.

⁴ *McDonald v. Mich. Cent. R. Co.* (Mich.), 65 N. W. 597. The above is the syllabus stated in the report. From a reading of the case I cannot extract the same conclusion. I fail to notice the conclusion that it is a question

for the jury whether the knowledge by the engineer of the defect is notice to the company. The opinion states clearly that it is the duty of the engineer, when the company so imposes it, to inspect his engine, and it is immaterial whether the company has provided other inspectors or not. Such inspection in the ordinary operation of the road is the act of a fellow-servant as between the engineer and brakeman. Later in

439. Foreman of repair-shops.—Where notice of a defect in an engine had been given to the foreman of the shops whose duty it was to repair the same and to whom such reports were required to be made by the rules of the company, it was held that such notice to him was in effect notice to the company.¹

440. Foreman of round-house.—Where an engineer informed the foreman of the round-house, his immediate superior, of a defect in the throttle-valve of his engine, and it appeared that it had been out of repair for some time, it was held that notice to such foreman was notice to the company, though he did not have charge of the machinery, upon the ground that every one is presumed to do his duty, and it was not unreasonable to assume that through him the company obtained the requisite notice, whether he had immediate charge of the machinery or not.²

441. Foreman constructing power-house.—Notice to an employee having charge of the wood-work and the construction of a power-house that a water-valve in such house is defective is not such notice to the company as will render it liable for an injury to an employee, sustained through a defect in the valve.³

442. General agent.—Where an employee was injured by the fall of an elevator in a building, caused by the links of the chain, from long use, becoming worn thin, and one of them breaking, and it appeared that the general agent of the employer, who had charge of the business and who had authority to have it repaired, had notice of the defect, it was held that notice to such an agent was notice to the master;

the opinion reference is made to inspection and reports by operatives where no inspector is provided, and, from the language used, would seem to imply that such operators represent the master, and, as to such acts, are not fellow-servants with other operatives. I must confess that I cannot under-

stand the distinction attempted by the learned judge.—ED.

¹ Brabbitts v. C. & N. W. R. Co., 38 Wis. 289.

² Chicago & Eastern Ill. R. Co. v. Rung, 104 Ill. 641.

³ Deane v. Roaring Fork, E. L. & P. Co., 5 Colo. App. 521, 39 Pac. 346.

that the duty of keeping the appliance in repair was personal to him, and therefore he was liable for the consequence of the neglect of causing the injury.¹

443. Inspector.—It was held that notice of defects in appliances to one employed by the master to inspect them is notice to the master.²

444. Master-mechanic.—Where an engineer was killed by the explosion of a boiler, known by the defendant's master-mechanic to have been out of repair, and who had given proper instructions to have it examined and repaired, which the mechanics to whom such instructions were given failed properly to do, it was held that the master was liable for the consequences of their neglect.³

445. Mine boss.—Where the jury had found that a drawbar to a loaded car used in a mine was cracked, and by breaking caused injury to an employee, and that the mine boss had actual notice of such defect, it was held that the master was thus chargeable with notice, and consequently liable.⁴

446. Section-master.—It was said if the servant of a railroad company appointed to keep the track in repair knows, or by the proper discharge of his duties might have known, of its condition, then his knowledge, or that which he might have acquired, is imputable to the company.⁵

447. The rule applied where the section-master knew of a latent defect in the lever upon a hand-car. His knowledge is imputable to the company.⁶

448. The rule was applied where one who was intrusted with the duty of keeping a railroad track in repair had knowledge of the dangerous position of a stump at the side of the track.⁷

¹ *Corcoran v. Holbrook et al.*, 59 N. Y. 517.

² *Dutzi v. Geisel*, 23 Mo. App. 676.

³ *Fuller v. Jewett*, 80 N. Y. 46. See, however, *Schulz v. Rohe*, 149 N. Y. 132.

⁴ *Rima v. R. I. Works*, 120 N. Y. 433.

⁵ *Porter v. H. & St. J. R. Co.*, 71

Mo. 66; *Lewis v. St. L. & I. M. R. Co.*, 59 Mo. 495; *Hall v. Missouri Pac. R. Co.*, 74 Mo. 298.

⁶ *Clovers v. W. St. L. & P. R. Co.*, 21 Mo. App. 213; *Dedrick, etc. v. Mo. Pac. R. Co.*, 21 Mo. App. 433.

⁷ *Riley v. Railway Co.*, 27 W. Va.

145.

449. The rule was applied to a section-master and a track-walker who had knowledge of the dangerous condition of the track by reason of the position of a large stone that might fall upon the track.¹

450. Superintendent.—Notice to the superintendent of a railroad company of defects in the track is notice to the company. It is not the company, but the officer to whose care is committed the particular department of its business, who is expected to use ordinary care in the conduct thereof, and whose negligence therein is the negligence of the company.²

451. It was said that knowledge by the superintendent of a mine of a defect in the machinery used will render the company for whom he acts responsible for the injury caused thereby.³

452. Switchman.—It was held that the knowledge of a switchman in the company's yard of defects in a car was imputable to the company. It was further held that where such switchman communicated by telephone from the switch house in the yard, to the office (such means of communication being provided by the company), that the car was not in order, and received a reply from some one to send her out, the presumption was that the answer was from some one with authority, and the admission of proof of such occurrence was not error.⁴

453. Yard-master.—Where an employee complained to a yard-master of the defects in an engine, and the yard-master or assistant master mechanic promised to have it repaired, and he also objected to the fireman running the engine, and was also promised by the yard-master that he would not be permitted to do so in the future, it was held this promise was binding upon the company.⁵

¹ *Balt. & Ohio R. Co. v. McKenzie*, 81 Va. 71.

² *Patterson v. Pittsburg, etc. R. Co.*, 76 Pa. St. 389; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104.

³ *Bowers v. Union Pac. R. Co.*, 4 Utah, 215, 7 Pac. 251.

⁴ *Reed v. Burlington, C. R. & N. R. Co.*, 72 Ia. 166.

⁵ *Lyttle v. C. & W. M. R. Co.*, 84 Mich. 289, 47 N. W. 571.

454. Where the draw-heads upon a locomotive and a car were proven to have been defective by being worn out, and the overseer of the yards had been informed of the defects, it was held that notice was thus imparted to the company.¹

E. Reasonable Time Must Intervene After Discovery to Remedy the Defect.

454a. Rule.— Unless there has been reasonable time and opportunity to remedy a defect in appliances after discovery thereof, the failure so to do cannot be negligence. Mere knowledge without opportunity to act on it would not constitute negligence.²

454b. A railroad company whose track is broken without its fault is under no obligation to its employees to repair it in a specified time, if it duly warns them of the defect. It owes a duty to the public to keep its track in a suitable and safe condition and run its trains with regularity and dispatch for the transportation of passengers and freight, but an employee cannot have a right of action against the company on this obligation.³

454c. Where it appeared that a promise had been made to a motorman to repair a defect in the track, and it was urged that there was not sufficient time between the time the defendant had notice of the defect and the injury to the employee to have repaired the track, it was said that it was no excuse for using the defective track. If it could not be immediately repaired so as to make it safe, its use should have been discontinued.⁴

¹ *Union Stock Yards Co. v. Larson*, 38 Neb. 492, 56 N. W. 1079. *United States Rolling-Stock Co. v. Weir*, 96 Ala. 396, 11 So. 436.

² *Seaboard Mfg. Co. v. Woodson*, 94 Ala. 143, 10 So. 87; *Wilson v. Railway Co.*, 85 Ala. 269, 4 So. 701; *I. B. & W. R. Co. v. Flanagan*, 77 Ill. 365; *Kansas City M. & B. Co. v. Webb*, 97 Ala. 157, 11 So. 888; ³ *Henry v. L. S. & M. S. R. Co.*, 49 Mich. 495, 13 N. W. 832. See, also, *St. Louis, I. M. & S. R. Co. v. Morgart*, 45 Ark. 318.
⁴ *Harris v. Hewitt* (Minn.), 65 N. W. 1085.

CHAPTER II.

ASSUMED RISK.

- A. *Rule*, 455 et seq.
- B. *Ordinary Risks*, 477 et seq.
- C. *Known Risks*, 503 et seq.
 - 1. Rule and Distinctions, 503 et seq.
 - 2. Appliances, 513 et seq.
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- D. *Presumptive Knowledge — Opportunity to Discover*.
 - 1. Rule, 639 et seq.
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- E. *Equal Knowledge*, 775 et seq.
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 - 3. To Report Defects, 830 et seq.
- F. *Appreciation of Danger*, 840 et seq.
- G. *Loaded Cars*, 859 et seq.
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- I. *Fear of Discharge*, 880 et seq.
- J. *Haste, Attention Diverted*, 886 et seq.
- K. *Reliance upon Master*, 898 et seq.
- L. *Burden of Proof*, 916 et seq.
- M. *Distinction between Assumed Risk and Contributory Negligence*, 938 et seq.

A. *Rule*.

455. The general rule resulting from considerations as well of justice as of policy is that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural

and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly.¹

456. By the universally acknowledged rule of the common law, when an employee of age and intelligence enters another's service he is presumed to understand, and in the absence of any agreement to the contrary to assume, all the ordinary risks incident thereto, and to measurably predicate his wages upon the extent of the perils he is to encounter and assume, among which are those he knows are more or less likely to occur through occasional negligence of his co-employees.²

457. A servant, when he engages in an employment, is held to have done so with a knowledge of the risks of its ordinary hazards, whether from the carelessness of fellow-servants in the same line of employment or from latent defects or the ordinary dangers in the use of machinery and appliances used in the business. The qualification of the rule is that the master must use all reasonable precautions to select capable and prudent fellow-servants and machinery, and implements properly constructed and of good material.³

458. It was said by Cockburn, C. J., in *Clark v. Holms*, 7 H. & N. 943, in stating the rule: "The rule I am laying down goes only to this: that the danger contemplated in entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept."

The Maryland court states that the law is settled in accord with such a proposition.⁴

¹ *Farwel v. Boston & Worcester R. Co.*, 4 Me.c. 49. *Allen*, 441; *Gilman v. Eastern R. Co.*, 10 Allen, 233; *Wonder v. Balt. & Ohio R. Co.*, 32 Md. 411.

² *Hare v. McIntyre*, 82 Me. 240.

³ *Richardson v. Cooper*, 88 Ill. 270; *Snow v. Housatonic R. Co.*, 8 ⁴ *Cumberland & Penn. R. Co. v. State to use of Moran*, 44 Md. 283.

459. The rule embraces within its scope not only such risks as are incident to the business, but such risks as should become apparent to the employee by ordinary observation or are readily discernible by a person of his age and capacity, in the exercise of ordinary care, or where his means of knowledge are equally as great as those of his employer, or if he discovers the unusual risk and makes no complaint. In such circumstances even extraordinary risks may assume in legal effect the shape and proportions of only ordinary and incidentals perils, adding nothing to the liability of the master and affording the servant no additional grounds for recovery in the event of injuries received.¹

460. Where there are increased perils in the business by reason of the use of defective appliances or otherwise, known to the master, or for which he is responsible, and unknown to the servant, then it is that such increased perils are not risks assumed.²

461. Duties rest upon the employee as well as upon the employer; obligations are imposed upon the one by law as well as the other. One of the obligations thus imposed is that the servant shall assume the risks incident to the employment which are known to him, or which by the exercise of reasonable care he might have known. The risks that the employee assumes, however, are such as arise in cases where ordinarily safe machinery and appliances are provided. If machinery of an unusual and more dangerous character is provided, and the employee has no notice of the danger, he does not assume the risk attendant upon its use.³

462. Where an employment is attended with danger, a servant engaging in it assumes the hazards of the ordinary perils which are included in it; but this assumes that the

¹ *Alcorn v. Chicago & Alton R. Co.*, 108 Mo. 81. *Strahlendorf v. Rosenthal*, 30 Wis. 674.

² *Behm v. Armour*, 58 Wis. 1; ³ *Pennsylvania Co. v. Whitcomb*,
Naylor v. Railway Co., 53 Wis. 661; 111 Ind. 212, citing *Balt. & Ohio &*
Bessex v. Railway Co., 45 Wis. 477; *C. R. Co. v. Rowan*, 104 Ind. 88.

servant actually knew of the danger, or by the exercise of ordinary care would have known of it, and does not, therefore, have application where the servant was ignorant of the danger and had no reasonable opportunity to know of it; nor can it manifestly have application where the servant enters upon a hazardous employment under the promise of his employer that he shall thereafter be instructed in his duties, for in such case the servant relies for protection upon the instructions thereafter to be given him.¹

463. The risks a servant assumes on entering upon the employment of a master are those only which occur after the due performance by the employer of those duties which the law imposes upon him.²

464. An employer owes one who is about to enter his service no duty to inspect all the work which has been done previously and which ordinarily may be intrusted to them without liability to their fellow-servants for their negligence; and the risk of accident from previous negligence of servants in their field is one of the ordinary risks of the business which the employee assumes by virtue of his contract on entering the service.

This was said where a staging was built by servants before the plaintiff entered the service, which proved defective, and it appeared that the master had furnished sufficient sound materials for its construction.³

465. If the danger is so great that an ordinarily prudent man would have observed and heeded it, then it is one which the employee assumes, if with knowledge of its existence, and without any promise on the master's part to remove the danger, he voluntarily continues in the service of his employer.⁴

¹ McCormick Harv. Mach. Co. v. ville, etc. R. Co. v. Caven's Adm'r, Burandt, 136 Ill. 170, 26 N. E. 588; 9 Bush (Ky.), 559.
Swaboda v. Ward, 40 Mich. 420.

² Benzing v. Steinway & Sons, 101 N. Y. 547; Stringham v. Stewart, 100 N. Y. 516; Pantzer v. Tilly Foster I. M. Co., 99 N. Y. 368; Louis-
³ O'Connor v. Rich, 164 Mass. 560.
⁴ Rogers et al. v. Leydon, 127 Ind. 50; Rietman v. Stolte, 120 Ind. 314.

466. In the contract of hiring there is an implied undertaking on the part of the master that he will use reasonable care to furnish safe premises, machinery and appliances for conducting the business safely, and that he will use all reasonable care to furnish competent and prudent employees. The master by the contract of hiring does not become an insurer against injury to the servant. On the other hand, in the contract of hiring there is an implied undertaking on the part of the servant that he will exercise reasonable care to avoid injury, and that he assumes all ordinary risks of the business and all risks from the negligence of his co-employees.¹

467. A servant, superior to one who was injured, and of such authority as, under the law of Texas, to be a vice-principal, placed a stick against a derailed car, but not in the pockets provided for the purpose, and ordered such employee to hold it so that another car could be backed against it, assuring him there was no danger, and while obeying the order a car was backed with great force, displacing the stick and injuring the plaintiff.

It was broadly stated: 1. That negligence of a superior in line of employment who has dominion and control of a fellow-employee, as to such subordinate employee, is the negligence of the master. 2. The servant does not assume the risk of negligence on the part of the master as incident to his employment; on the contrary, he has the right to expect and rely upon his master to exercise ordinary prudence and care.

The question of knowledge of the danger or risk on the part of the servant is not discussed.²

468. It was alleged that the plaintiff was ordered by his foreman to sit at the rear of a hand-car under the brake-handles, and while in such position, when the car was mov-

¹ Pittsburg, C. & St. L. R. Co. v. Hilton (Tex. App.), 30 S. W. 679. Adams, 105 Ind. 151. Writ of error denied by supreme

² Missouri, K. & T. R. Co. v. Hamilton court.

ing rapidly, he was ordered to arise and take hold of the brake-handles while they were moving; that this was impossible without danger of being struck by the handles; that he did not know the danger of obeying such order and the foreman did. He was struck by the brake-handles and injured. It was held that the complaint did not state a cause of action. It was said: He is presumed to know and comprehend obvious dangers which require no skill or experience to be appreciated, or such dangers as the skill and experience he may have ought reasonably to charge him with. The negligence of the master cannot be predicated simply on the fact that he ordered his employee to do the work, and this is true whether the work was within the scope of the ordinary duties of the employee or not. This language hardly accords with what was said in *Railway Co. v. Hamilton* (Tex. App.), 30 S. W. 679. (It is, however, more consistent with the general doctrine as expressed by the Texas court and all others.)¹

469. Missouri rule.—Where a brakeman engaged in making a running switch grasped the hand-hold on the end of the car with one hand and with the other pulled the coupling-pin, and in the effort to raise himself to an upright position his feet slipped from the rod on which he was standing, and after swinging by his hands from the hand-hold he fell and was killed, and it appeared that the hand-hold was bent against the car so that it could not be grasped for about six inches from the center, it was held that the jury could infer from the evidence that the defective condition of the hand-hold was the proximate cause of his injuries.

It was said in respect to this ruling: "It seems to us that the inference might fairly be drawn by a jury that deceased fell because in the emergency he was unable to secure a firm hold on the rod by reason of its defective condition.

¹ *Jones v. Galveston, H. & S. A. R. Co.* (Tex. App.), 31 S. W. 706.

“This inference, it is true, is not a necessary one. On the contrary, it might as readily and fairly be inferred from these facts that the slipping of the foot was the sole cause of the injury. This question being ruled affirmatively, the jury should have been left to draw the correct inference from all the facts in evidence.”

NOTE.—It thus appears that the mere guess or conjecture of the jury was permitted to supersede proof. That the jury may not thus draw an inference where two or more inferences equally consistent with the evidence may be drawn is the universal doctrine of all courts.

See EVIDENCE; CONJECTURE.

Upon the question of assumed risk it was said: “The rule is too well settled in this state to require the citation of cases, that a person when he enters the service of another assumes all the risks and dangers usually incident to the employment in which he engages; but the rule is equally well settled that the employer is charged with the duty of not subjecting his servant to risks by his own negligence, and the servant does not assume the risk of dangers arising from his neglect. It is claimed that though the duty to repair defects is neglected by the master, if the servant is advised of it and thereafter elects to continue in the service and to use the defective means, he thereby assumes the risk of injury therefrom. The rule thus invoked would relieve the master of his duty as soon as the servant became aware of its violation. Such is not the law of this state. The duty to repair is a continuing one, and a failure to discharge it is negligence, though the servant may continue in the service after knowledge thereof. An express contract will not relieve him.

“The question has often been raised, discussed and decided whether a servant can recover for injuries in the use of machinery or appliances known by him to be defective. The non-liability of the master in such cases, however, is properly placed upon the ground of contributory negligence rather than that of assumption of risk. The question is one

of contributory negligence, which should be submitted to the jury, unless the defect is so glaringly hazardous that the court could declare, as matter of law, that a person of ordinary prudence would not use it."¹

470. An employee of the defendant was injured while at work in defendant's oil warehouse by a beam falling upon him. He knew the dangerous condition of the premises and that this beam was likely to fall. It was said: It is a familiar principle that a person entering the service of another assumes all risks naturally incident to and within the scope of the employment, or if after his employment and in the course thereof he discovers manifest dangers and continues in the service without complaint, he will be presumed to have assumed the risks. It was held that he assumed the risk.

The doctrine of contributory negligence, a special feature in this state, it was said would apply if the plaintiff was ordered into a place of danger by his employer, or was injured while obeying the command of his master in doing something not in the ordinary course of his employment. In such cases there is no assumption of risks.²

471. The doctrine was stated that an employee does not assume the risk of those dangers which are known by and can be obviated or avoided by the exercise of reasonable care and caution on the part of the employer, and applied where an employee was injured by the shunting of cars in upon a track without warning such employee, the neglect being that of a fellow-workman, who did not take his place of duty to which he was assigned on the front end of the car, but occupied a place at the rear end. It was held that it was the duty of the employer to see and know that each man occupied at all times the particular position to

¹Settle v. St. Louis & S. F. R. Co., 127 Mo. 336, 30 S. W. 125. risk and contributory negligence, 871 to 895.

See distinction between assumed ²Lucey v. Hannibal Oil Co., 120 Mo. 32, 31 S. W. 340.

which he was assigned. That his neglect of duty in this respect was chargeable to the master.¹

472. A charge was held erroneous which stated that the servant assumed such risks as necessarily attended the business. He assumes such as commonly attend it.²

473. While the circumstances may be such as to charge an employee with the assumption of the risk of danger from the use of an appliance, yet where such appliance is being operated personally by one of the defendants, he may not assume such risks as are created by the negligent manner in which it is operated.

This was said where an employee in a mine was injured by the rope which was attached to a tub used to elevate the men and ore by means of a hook, becoming unfastened.³

474. Exception to by the Texas court.— It was said if a railroad company shall neglect to cut down standing trees that may, on account of their nearness to the road-bed, be in danger when falling of obstructing the road, whereby injury results to an employee of the company, it becomes liable in damages on account of its negligence to such employees, and this though the trees are standing on the land of another.

Where the injury results to the servant on account of defective construction, the law does not consider that the servant, in entering the service, assumed the risks incident to the defective construction; on the contrary, the company are required to furnish a road-bed properly constructed and properly equipped with sound machinery and apparatus, and the right of way so cleared as to reasonably prevent danger from falling timber.⁴

¹ *Promer v. M., L. S. & W. R. Co.*, 90 Wis. 215. See *contra*, *Potter v. N. Y. C. & H. R. R. Co.*, 136 N. Y. 77; *Central R. Co. of N. J. v. Keegan*, 160 U. S. 259.

² *Gulf, C. & S. F. R. Co. v. Kizziah*, 86 Tex. 81, 23 S. W. 578.

³ *Moran v. Harris et al.*, 63 Iowa, 390.

⁴ *Texas & St. L. R. Co. v. Vallie*, 60 Tex. 481.

475. Alabama statute.—Under the provisions of the Code of Alabama, section 2590, that an employer is answerable in damages to an employee when the defect by reason of which the injury was caused arose from the negligence of the employer or his agent, and is exempt from liability when the employee, knowing of the defect, and that the employer was ignorant of it, failed to give information thereof within a reasonable time, contributory negligence cannot be imputed to the employee for continuance in the service after discovering a defect, unless he fails to give information within a reasonable time, or unless injury is so imminent that a prudent man would not continue in the service under the circumstances.¹

475a. An engineer was injured by the explosion of a locomotive boiler. It appeared that for months prior to his injury he knew of the dangerous condition of the boiler, and knew the perils to which it exposed him; still, he continued to use it. The action was brought under section 2590, Code of 1886. It was held that he assumed the risk and could not recover.

The rule applicable under the statute was stated to be that where an employee, knowing and appreciating the dangers and risks, elects voluntarily to encounter them and is injured, he cannot maintain an action to recover for injuries sustained; but if the employer undertakes expressly or impliedly to remedy the defect and remove the danger within a reasonable time, such an undertaking or assurance is an assumption by the employer of the risk incident to the duties of the employment during such reasonable time; and if the employee is injured in the meantime by reason of the risk and danger thus assumed by the employer, the latter will be held responsible for the injury. But if the employee remains in the service and continues to voluntarily encounter such risks, and with a knowledge and appreciation of the risk, without such assurance, or after the time within which the defect should have been remedied and the danger re-

¹ *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435, 8 So. 357.

moved, according to such undertaking or assurance, the risk becomes his own.¹

476. Where the trial court was requested to charge as to the effect upon the question of waiver of knowledge by a servant of defects and his continuing the employment without complaint, it was said: The court did not err in rejecting this instruction. It was palpably improper. It is sanctioned neither by reason, justice or law. The usual and legal duty of every employer is to provide all means and appliances reasonably necessary for the safety of those in his employment. It is a cruel and inhuman doctrine that the employer, though he is aware that his own neglect to furnish the proper safeguards for the lives and limbs of those in his employment puts them in constant hazard of injury, is not to be held accountable to those employees who, serving under such circumstances, are injured by the negligent acts and omissions, if the injured parties, after themselves becoming cognizant of the peril occasioned by their employer's negligent way of conducting his business, continue in his employment and receive his pay, though they may be virtually compelled to remain by the stern necessity of earning the daily food essential to keep away starvation itself.²

B. Ordinary Risks.

477. Bridge being repaired.—Where an employee was injured by slipping through a bridge in process of repair, it was held that he could not recover; that the danger was a risk incident to the employment assumed by him. The facts were that a train stopped in the night upon the bridge, and in passing along the track in the performance of his duty a brakeman slipped through and was killed. It was said: Railroad companies, in providing for the safety of their employees, are not required to anticipate and guard against every possible danger, but only such as are likely to occur,

¹ *Bridges v. Tennessee Coal, Iron & R. Co. (Ala.)*, 19 So. 495.

² *Richmond & D. R. Co. v. Norment*, 84 Va. 167.

and therefore cannot be required to guard their whole track to prevent accidents in emergencies.¹

478. Building in process of construction.— A watchman in an unfinished store building was injured by falling down the elevator shaft. He knew that the elevator was not finished, that it was not protected, and that mechanics were at work upon it. It was held that the risk was in the nature of things incident to the service and was assumed.²

479. Cars, double deadwoods.— An experienced employee is presumed to know that cars with double deadwoods are likely to be used, and this though he has in fact had no experience with them.³

480. Cars, brake-chain.— An employee in the service of a railroad company assumes the risks and dangers incident to the business in which he is engaged; and while the company is bound to furnish suitable and safe machinery and appliances for his use, having done so it is not liable for an injury resulting from their breaking or failure, unless it is shown that the corporation has been guilty of negligence in regard thereto. The risks are an element of the employment, and the employee cannot claim on account of infancy to be relieved from the consequences of such risks.

This was said where a brake-chain, which had been used but four times, broke. There was no evidence but that the chain was perfect when it was put on the car, or that proper care had not been exercised by defendant in making examinations, or that the cause could have been discovered by the usual and ordinary means.⁴

481. Cars, ice forming on.— Where the alleged cause of injury to a brakeman was the formation during the trip of sleet or ice on the edge of the car where he was compelled

¹Koontz v. C., R. I. & P. R. Co., Black, 88 Ill. 112; Mich. Cent. R. Co. v. Smithson, 45 Mich. 212; 65 Iowa, 224.

²Conway v. Furst (N. J. L.), 32 Atl. 330. Hathaway v. Mich. Cent. R. Co., 51 Mich. 253, 16 N. W. 634.

³L. B. & W. R. Co. v. Flanagan, 77 Ill. 365; T. W. & W. R. Co. v. De Graff v. N. Y. C. & H. R. R. Co., 76 N. Y. 125.

to stand to work the brake, it was said that the increased dangers of railroading arising from rain, snow and ice, or the weather, are part of the ordinary risks incident to the business.¹

481a. Cattle-guards.—The danger of injury from the operation of trains over cattle-guards is one incident to the service, and therefore assumed by employees.²

482. Floor, slippery condition of.—Where an employee in a mill fell upon a floor, slippery and wet from soap and water, which was its normal condition from the character of the work, and he was injured by his hand getting caught in an exposed pulley in one of the machines, and it appeared the condition of the floor and the pulley was the same as at the time he entered the employment, it was held that such risk was incident to the business and one he impliedly assumed.³

483. Where an employee in a mill was injured by reason of slipping upon a wet floor while in the act of turning a lever and was thus forced into the gearing, and it appeared he must have known of these conditions, and his liability to slip was just as obvious to him as to any other person while performing the act, it was held that a verdict should have been directed for the defendant.⁴

484. Frogs, unblocked.—The use of unblocked frogs was held to be a risk assumed by a servant in entering the service of a railroad company where the method of blocking frogs was not in use.⁵

485. Hammers, chips flying from surface.—Where an employee, whose duties were in connection with riveting pieces of iron, was injured by chips or scales flying from the face of the hammer used, and it appeared that chips would fly as the ordinary result of doing such work where

¹ O'Bannon's Adm'r v. Louisville & N. R. Co. (Ky.), 6 S. W. 434.

² Fuller v. Lake Shore & M. S. R. Co. (Mich.), 66 N. W. 593.

³ Kleinst v. Kunhardt, 160 Mass.

230. See, also, Murphy v. American Rubber Co., 159 Mass. 266.

⁴ Scharenbroich v. St. Cloud F. W. Co., 59 Minn. 116, 60 N. W. 1093.

⁵ Lake Shore & M. S. R. Co. v. McCormick, 74 Ind. 440.

steel hammers are used, that all hammers are liable to chip, it was held that the jury should have been charged in reference to this feature of the case, in effect, that, if such was the fact, injuries from such source were risks incident to the employment.¹

486. Horses becoming frightened.—Where an employee was injured by a team becoming frightened at passing cars, causing machinery, which he was assisting to unload from the wagon, to fall on his foot, it was held that the conduct of the driver and the circumstances which attended the transaction were risks incidental to plaintiff's employment, and such risks were therefore assumed.²

487. Kind of appliances.—A servant accepts the service subject to the risks incidental to it; and where implements of the employer's business are at the time of a certain kind or condition and the servant knows it, he can make no claim upon the master to furnish other or different safeguards.³

488. Locomotive.—Where an engineer was killed by the burning of a bridge alleged to have been set on fire by a locomotive of defective design, and it appeared that deceased had himself been driving an engine of the same design, it was held to be error to refuse an instruction that when he took employment as an engineer he assumed to understand the engine and knew the danger attending its use, and was presumed to have taken the risk of being injured by reason of any peculiarity in the construction of the engines in use by the defendant.⁴

489. Machinery, discovery of defects by repair-man.—It was said that a machinist employed by a corporation, not to use machinery, but to keep it in good order, and having knowledge that some of it is imperfect, and that the em-

¹ *H. S. Hopkins Bridge Co. v. Burnet*, 85 Tex. 16, 19 S. W. 886. *velope Co.*, 101 N. Y. 520. See *APPLIANCES, KIND.*

² *Steffen v. Mayer*, 96 Mo. 420.

³ *Sweeney v. Berlin & Jones En-*

⁴ *Texas & P. R. Co. v. Minnick et al.*, 57 Fed. 362; affirmed, 61 Fed. 635 (C. C. A.).

ployees cannot be relied upon to prevent it from becoming dangerous for lack of oil, takes the risk of discovering the condition of the machinery at the time he attempts to repair it, such risk being incident to his vocation.¹

490. Mines.—An experienced miner assumes the risk of danger from the falling of ore, where such is likely to happen in the ordinary course of prosecuting the work; and the mere fact that the actual work that he is engaged in at the time of receiving the injury is different in kind from that which he was employed to do, but which he undertook without objection at the request of the foreman, does not prevent the application of the rule.²

491. Motion or jerk of a train.—Where an employee on a train, while stepping from one car to another, was thrown off by a sudden jerk of the train, and it appeared that jerks of that character were incident to the operation of the train, it followed that such cause was a risk assumed.³

492. Nitro-glycerine, hauling of.—Where a railroad company at the request of another company contracted to haul for a short distance a load of nitro-glycerine, and while performing the service the nitro-glycerine in such car exploded, killing a switchmen, it was held that no neglect of duty was shown; that as matter of law it was not negligence under such circumstances to transport such car; that the risk of injury from such source was incident to the servant's employment, which he assumed.⁴

492a. In thawing dynamite the master's duty was said to be the exercise of such reasonable care as is commensurate with the danger which may be reasonably appreciated from such use, and such ordinary care as reasonable and prudent men, under like circumstances, use in thawing the same.⁵

¹ Dartmouth Spinning Co. v. Achord, 84 Ga. 14, 10 S. E. 449.

² Paule v. Florence Mining Co., 80 Wis. 350.

³ Central R. & B. Co. v. Sims, 80 Ga. 749, 7 S. E. 176.

⁴ Foley v. C. & N. W. R. Co., 48 Mich. 622, 12 N. W. 879.

⁵ Bertha Zinc Co. v. Martin's Adm'r (Va.), 22 S. E. 869.

493. Prize-pole.— It was said the size of a prize-pole used in raising a broken turn-table was obvious to the servant using it, and the fact that it might break was a risk incident to the business, which he assumed.¹

493a. Quarry, position of rock in.— Where it was alleged that defendant was negligent in placing and permitting to remain for three months a large stone with its edge resting on two small stones laid on loose earth, which was liable to settle and let the stone fall; that the plaintiff was ignorant of the danger and could not see the earth under such stone, and that he was injured by the stone falling upon him, it was held that the complaint was insufficient in that it did not show that the loose earth was the cause of the stone falling, but rather that it appeared therefrom that the danger was incident to the service, the assumption of which risk the plaintiff should negative in his complaint.²

494. Tracks obstructed by snow.— Railroad employees assume the risk of all dangers necessarily attendant upon the operation of the road; among these dangers are those arising from snow, and its removal from the track in the usual manner by the use of snow plows; and an employee who is injured by a snow bank made along the track by the ordinary use of a snow plow cannot recover for such injury, and the company cannot be charged with negligence on account thereof.³

495. A fireman who was injured by the overturning of his engine while engaged in "bucking" snow was held to be within the rule.⁴

¹ Bohn v. C., R. I. & P. R. Co., 69 Iowa, 161; 106 Mo. 429.

² Salem Bedford Stone Co. v. R. Co., 21 Oreg. 530, 28 Pac. 625. Hobbs (Ind.), 42 N. E. 1022.

³ Dowell, Adm'r, v. Bur., C. R. & N. R. Co., 62 Iowa, 629; Brown, Adm'r, v. C., R. I. & P. R. Co., 64 Iowa, 652; Piquegno v. Grand Trunk R. Co., 52 Mich. 40, 17 N. W. 232; Brown v. C., R. I. & P. R. Co., 69 Iowa, 161; Wellman v. Oregon, S. L. & U. N. R. Co., 21 Oreg. 530, 28 Pac. 625. *Contra*, Cregg v. Railway Co., 91 Mich. 624, 52 N. W. 62.

⁴ Bryant, Adm'r, v. Bur., C. R. & N. R. Co., 66 Iowa, 305; Drake v. Union Pac. R. Co., 2 Idaho, 453, 21 Pac. 560.

496. The rule was also applied to an engineer injured while engaged in opening a railroad from obstructions formed by an accumulation of snow.¹

497. In relation to the assumption of the risks incident to the fall of snow and formation of ice, the rule was stated to be: "When entering into the railway service in such a latitude, an employee assumes such risks as are usually and customarily incident to the falling of snow, the forming of ice and the removal of the same from tracks and places where employees are required to work, when the removal and disposition thereof is done in a proper and reasonable manner, in the exercise of due and ordinary care for the safety of employees." It was held, a switchman being injured in the attempt to mount a moving car, that whether the snow was removed and placed in a proper and reasonable manner was a question for the jury, there being some evidence that it was not placed, when removed, as far from the tracks as was usually and customarily done.²

498. Tracks unfinished.—Where a car-cleaner in the defendant's elevated railroad yards was killed by stepping backwards from a car at night, in falling through an opening in the structure upon which the tracks were laid, and it appeared that the structure was new and not yet finished; that deceased had been there daily for three weeks in the capacity of watchman and car-cleaner and saw the carpenters at work planking the structure and knew its condition, it was said that if the deceased knew that the yard was in an unfinished state, that it was uncovered in places, and that it was in the course of being covered, he assumed, by continuing in the employment, the risk of falling through these uncovered places, and the defendant was not liable.³

499. Where a conductor in charge of a construction train used in constructing a new road was killed by the giving

¹Derr v. Lehigh Valley R. Co.,
158 Pa. St. 365.

³Kennedy v. Railway Co., 145
N. Y. 288, 39 N. E. 936.

²Lawson v. Trusdale (Minn.), 62
N. W. 546.

way of a portion of the road-bed, it was held that a distinction was recognized between a completed road and one in process of construction, and that he assumed the risk incident to its construction.¹

500. An employee on a construction train, having knowledge that the rails were not properly spiked, and were laid without ballast, upon a road not finished, who was injured by the derailment of the train, caused by the imperfect and incomplete manner of constructing the track, was held to have assumed the risk.²

500a. A brakeman who enters the employment of a railroad company to work on a construction train, and who can see that the road is not finished and that trees border it on either side, assumes the risk of being struck by a tree growing close to the track and in plain view. It was said: As a general rule it is the duty of a railroad company to furnish its employees a safe place to work while operating its train; yet the rule must be considered with some qualifications when a new road is being built. The employee cannot complain of the imperfect condition of a road he is employed to assist in making perfect. He must take the risk naturally incident to such employment. He assumes greater risks upon such a road than upon a completed one, where he might expect that the track was clear and all obstructions removed.³

500b. Where an employee on a construction train was injured by the derailment of a car upon an unfinished track, and it appeared he had knowledge that the rails were only half tied and the track unballasted, it was held that in the absence of evidence that the defects in the track at the place of the accident were different from those along the whole track, or were different from those incident to rail-

¹ *Walling v. Congaree Const. Co.* (Mich.), 63 N. W. 312. See *contra*, (S. C.), 19 S. E. 723. *Gulf, C. & S. F. R. Co. v. Redeker*,

² *Evansville & R. R. Co. v. Henderson*, 134 Ind. 636, 42 N. E. 216. 67 Tex. 181, 2 S. W. 513. See *APPLIANCES, CONSTRUCTION*

³ *Manning v. C. & W. M. R. Co.* OF.

roads generally in the course of construction, he must be deemed to have assumed the risk.¹

500c. Where an employee, while riding on an engine, was killed by its being overturned, caused by the imperfect condition of the road-bed, which was newly made, and it appeared that the superintendent had warned him of the danger before the engine started over the track, and that the engineer told him to take his proper place in the cab, and the deceased replied, upon looking at the grade, "This is all right," it was held that he assumed the risk and a verdict should have been directed for the defendant.²

501. Trenches and pits.—Where an employee at work in a gravel-pit, while engaged in digging a bed of gravel from under a thin stratum of clay, was injured by the falling of the clay, it was held he could not recover from the master. The employee in such case takes upon himself the dangers incident to the work, and is bound to know where the earth is undermined and will fall in.³

502. It was said, however, the presumption of knowledge of the dangerous character of a bank of earth from its liability to fall is not precisely the same on the part of an employee and the master. The duty rests upon the master of using reasonable care in providing a safe place for the servant to work, and a jury may hold him bound to use reasonable care to guard against accidents, which at the moment of their occurrence a workman might not anticipate, though himself in the exercise of reasonable care under the circumstances in which he was placed.⁴

502a. Where an employee was engaged in digging a trench in that part of a street which had been filled, it was held that

¹ *Evansville & R. R. Co. v. Henderson*, 142 Ind. 596.

² *Niles v. Minneapolis, St. P. & S. S. M. R. Co.* (Mich.), 65 N. W. 103.

³ *Griffin v. Miss. & Ohio R. Co.*, 124 Ind. 326; *Vincennes Water Supply Co. v. White*, 124 Ind. 376; *Swanson v. City of Lafayette*, 134

Ind. 625; *Aldridge v. Midland Blast Furnace Co.*, 78 Mo. 559; *Naylor v.*

C. & N. W. R. Co., 53 Wis. 661; *Simmons v. C. & T. R. Co.*, 110 Ill.

340.

⁴ *O'Driscoll v. Faxon*, 156 Mass.

527.

he assumed the risk incident to the sides caving or sliding from such cause, where the character of the strata plainly indicated that the street had been filled.¹

C. *Known Risks.*

1. Rule and Distinctions.

503. Rule.—The rule as to the risks of the service, or ordinary risks, is entirely distinct from the rule of obvious risks; as to the latter it may well be doubted whether the doctrine can be said to rest wholly upon the implied agreement of the employee. Where the obvious risks of the business result in the injury, the inability of the employee to sue is due to the fact that he voluntarily assumed those risks, not necessarily under an implied contract to do so, but by an independent act of waiver, evidenced by his entering the employment with a full knowledge of all the facts.

It was held that the statute (Laws of 1890, ch. 398, sec. 12) imposing a penalty on the owners of factories in which women are employed, for failure to cover cog-wheels, did not prevent a woman from assuming the obvious risks from uncovered cog-wheels.²

504. Where a servant assents to occupy the place prepared for him and to incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by reasonable expense, have been made more safe. His assent has dispensed with that part of the master's duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have not been taken.³

¹Carlson v. Sioux Falls Water Co. (S. Dak.), 65 N. W. 419.

³Sullivan v. India Mfg. Co., 113 Mass. 396.

²Knisley v. Pratt, 148 N. Y. 372, 42 N. E. 986.

505. The implied contract between master and servant requires the master to provide suitable means and appliances and instrumentalities to enable the servant to do his work as safely as the necessary hazards of the employment will permit. It is well settled, however, that the master may conduct his business in his own way, although another method might be less hazardous, and the servant takes the risk of the more hazardous method as well, if he knows the danger attending the business in the manner in which it is carried on. Hence, a servant knowing the hazards of his employment as the business is conducted, if he is injured while employed in such business, he cannot maintain an action against his employer for such injury, merely because he may be able to show that there was a safer mode in which the business might have been conducted, and if it had been conducted in that mode he would not have been injured.¹

506. If the employment is attended with extraordinary risks or dangers, which are fully known to the employee when he enters in the employment, he assumes these risks as well as the ordinary risks incident to the employment.²

507. When a person enters into a dangerous employment he not only assumes the risks ordinarily incident thereto, but also the risk he may incur from manifest perils. The former are the risks which enter into his contract of employment; the latter are those which he voluntarily accepts when he knows of their existence.³

508. If the danger is known and the servant chooses to remain, he assumes the risk and cannot recover. He might leave if he chose, but, choosing to remain, he cannot remain at the risk of the master. Every employer has a right to judge for himself how he will carry on his business, and

¹ *Naylor v. C. & N. W. R. Co.*, 53 Wis. 661; *Simmons v. Chicago & Tomah R. Co.*, 110 Ill. 340.

² *Joyce v. City of Worcester*, 140 Mass. 245; *Pingree v. Leyland*, 135 Mass. 398; *Odell v. N. Y. C. & H. R. Co.*, 120 N. Y. 324.

³ *Gaffney v. N. Y. & N. E. R. Co.*, 15 R. I. 456; *Davidson v. Cornell et al.*, 132 N. Y. 228; *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20; *Alcorn v. Chicago & Alton R. Co.*, 108 Mo. 81.

workmen having knowledge of the circumstances must judge for themselves whether they will enter his employment, or, having entered, whether they will remain.¹

509. If an employee chooses to accept an employment which requires him to operate machinery which is defective from its construction or want of repair, and with knowledge of the facts enters the service, he cannot hold the employer liable for an injury within the scope of the danger which both the contracting parties contemplated as incident to the employment; and so, also, where the employee after he enters the service has notice of the defects in the machinery he is required to operate, and thereafter continues in the same without any promise on the part of the employer to render the same less hazardous, he assumes the extra risk and must bear the consequences; and the law presumes notice of those perils which are open and obvious and which the employee has an opportunity to ascertain.²

510. If the employee knows the tools are dangerous, unfit and unsuitable, if he nevertheless works with them and is injured, then he is at fault and cannot recover. The rule is not changed even though in performing the act the servant acts under orders from his superiors.³

511. While the servant assumes the risk of his employment, and as a general rule such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand upon the same footing as the master as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume the master will do his duty in that respect, so that when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders without being chargeable with

¹ Buzzell v. Laconia Mfg. Co., 48 Me. 113; Wormell v. Maine Central R. Co., 79 Me. 397; Tuttle v. Milwaukee R. Co., 122 U. S. 180.
son's Adm'r, 85 Va. 489, 8 S. E. 370; Hickey v. Taffe, 105 N. Y. 26.
³ Baker v. Western, etc. R. Co., 68 Ga. 699; Bell v. Western, etc. R. Co., 70 Ga. 566.

² Norfolk & W. R. Co. v. Jack-

contributory negligence or with the assumption of risks in so doing. This proposition is, however, subject to the qualification that he must not rashly and deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates. The facts are not given in the reported case.¹

512. An instruction that, if deceased lost his life by a cause not usually or reasonably attendant upon his employment, plaintiff was entitled to recover, unless deceased knew of such danger and fully comprehended its nature, was held error.

The objection is that it makes the question of the assumption of the risk and the question of contributory negligence turn upon whether the deceased knew of such danger, and, if he knew, whether he fully comprehended the same, instead of turning upon whether, in the exercise of ordinary care, he ought to have observed and comprehended the danger likely to result under the circumstances. In other words, it made the knowledge and comprehension of the deceased the measure of his standard of care.²

512a. The mere fact that a motorman upon an electric car knew that an employee was not provided to sand the track on an incline does not necessarily imply an assumption of the risk resulting from the failure of the company to provide such an employee, where it does not appear that such motorman knew that there was a necessity for such an employee.³

2. Appliances.

513. Bottles.—Where an employee was injured by the bursting of a bottle of ale which he was packing, caused by its being too lively, and it appeared that other bottles to his knowledge had broken in the same way and under the same conditions, it was held that he knew the danger and therefore assumed the risk.⁴

¹ *Cook v. St. Paul, M. & M. R. Co.*, 34 Minn. 45.

³ *Windover v. Troy City Ry. Co.* (N. Y.), 4 App. Div. 202.

² *Suter v. Park & Nelson Lum-ber Co.*, 90 Wis. 118, 62 N. W. 927.

⁴ *Lehman v. Van Nostrand* (Mass.), 42 N. E. 1125.

514. Cars, style of bumpers.—When a servant of mature age voluntarily continues in an employment, the hazard of which he knows is increased by reason of the use by his principal of unsafe appliances, he cannot recover for an injury occasioned by the use of such appliances.

This rule was applied where an employee was injured while coupling a car known as an empire car, claimed to be unsafe from the manner of its construction.¹

514a. Defective brake.—Where a motorman knew that the brake on the car was defective, he assumed the risk incident to such defect.²

515. The same rule was applied where an employee knew that the cars which he attempted to couple had different styles of bumpers and draw-bars.³

515a. Where an experienced brakeman was injured in attempting to couple cars with different styles of draw-heads, one of which was imperfect so that it required the coupling to be raised with the hand, which rendered the act more than ordinarily dangerous, and it appeared that such draw-bars were in common use upon the road, that he had worked there for some months, and had been in the habit of daily adjusting draw-bars of such character, it was held that he assumed the risk. It further appearing that he discovered the character of the appliance when the cars were three car-lengths from him, that he was guilty of negligence in attempting to couple them when in motion in the manner he did.⁴

516. Coupling, style of.—It was said a man cannot be without fault who uses a dangerous tool knowing it to be so. Hence, where a car-coupler undertakes to couple a car with full knowledge that there is extra danger arising from the negligence of some one, he is not without fault. He cannot escape the effect of his contract (in this case a writ-

¹ *Umback v. L. S. & M. S. R. Co.*, 83 Ind. 191.

³ *Toledo, W. & W. R. Co. v. Ashbury*, 84 Ill. 429.

² *Windover v. Troy City Ry. Co.* (N. Y.), 4 App. Div. 202.

⁴ *Secord v. C. & M. L. S. R. Co.* (Mich.), 65 N. W. 550.

ten one) by showing that a particular link or coupler regularly used on the train, and by him for months, was a less safe instrument for the purpose than other kinds.¹

517. It was held, however, a question for the jury whether a brakeman assumed the risk of coupling cars of uneven height with a straight link, where crooked ones were not furnished, after being induced by the conductor, who was not his fellow-servant, to attempt the act.²

518. Icy condition of.—An employee who assisted in piling lumber in a car which was slippery from frost and ice, and the lumber was thus likely to fall from a sudden movement of the car, was held to have assumed the risk of injury from such cause, even though he assumed the place of danger at the direction of a foreman.³

519. Hand-car.—Where the cause of injury to a section-man was alleged to be the uneven condition of the platform of a hand-car, it slanting forward at one end, and that fish-plates which were loaded on the car fell off by reason thereof, derailing the car, it was said such condition was known to the plaintiff. The car could have been run with the other end in front or the plates could have been piled behind the lever. It was held he could not recover.⁴

520. The rule was stated that where an employee of a railroad company knowingly uses defective appliances he cannot recover damages for injuries resulting therefrom.

This rule was applied where it was claimed that a hand-car in use by plaintiff and others was old and worn, and that the side had become beveled, so that an iron rail loaded thereon fell, injuring the plaintiff. It appeared that the plaintiff had worked with it for months and knew its condition.⁵

521. Where an employee working with a hand-car knew that one of the handles was broken, and that one of his fel-

¹ *Western & Atlantic R. Co. v. Bishop*, 50 Ga. 465.

⁴ *St. Louis, A. & T. R. Co. v. Mara* (Ark.), 16 S. W. 196.

² *Boatwright v. Northeastern R. Co.*, 25 S. C. 128.

⁵ *Johnson v. Western & A. R. Co.*, 55 Ga. 133.

³ *Hoth v. Peters*, 55 Wis. 405.

lows had substituted a bar of iron, it was held that the risk of injury from the use of such substituted handle was assumed.¹

522. Where an employee had knowledge of the defective condition of the lever on a hand-car, and thereafter continued to operate the car, it was held that he assumed the risk from such defect.²

523. A section-hand, in obeying the order of his section-boss to get on an overcrowded hand-car, with full knowledge of its being overcrowded, assumes the risk from such conditions and cannot recover for an injury received from such cause.³

524. Elevator.—Where an employee familiar with the construction of an elevator used in defendant's business only for transporting material, and who rides thereon under an implied license for his own pleasure and convenience, can only require of defendant the exercise of ordinary care in its operation, and accepts whatever risk is incident to the construction and operation of the elevator.⁴

524a. Where an employee knew there was no roof or cover over an elevator, and still continued its use, it was held he assumed the risk incident thereto, and it was immaterial that a statute may have required the employer to cover the same, or that he may have been so required by a building inspector.⁵

525. Ladder.—The rule was applied to an employee using a defective ladder, knowing it to be defective.⁶

526. Locomotive, defective step.—The rule was applied where a conductor knew that the step on an engine was slightly defective.⁷

¹ Powers, Adm'x, v. N. Y., L. E. & W. R. Co., 98 N. Y. 274.

² Norton v. Louisville & N. R. Co. (Ky.), 30 S. W. 599.

³ Bradshaw, Adm'x, v. Louisville & N. R. Co. (Ky.), 21 S. W. 346.

⁴ O'Brien v. Western Steel Co., 100 Mo. 182.

⁵ Shields v. Robins (N. Y.), 3 App. Div. 582.

⁶ Marsh v. Chickering, 101 N. Y. 396; Jenny Electric Light & Power Co. v. Murphy, 115 Ind. 566.

⁷ Jackson v. Kansas City, L. & S. K. R. Co., 31 Kan. 761, 3 Pac. 501.

527. Machinery.—Where an employee who was engaged in operating a machine in a woolen-mill was injured by placing his hand in the machine while in motion, knowing that by reason of the defects in the machine it was dangerous to do so, it was held proper to direct a verdict for the defendant.¹

527a. Where an employee engaged in operating a machine was injured, as alleged, by reason of a guard placed upon the machine, which increased the hazard, and it appeared he had operated the machine for nearly three years without accident or injury, it was held that he assumed the risk of operating the machine with the guard. That the risk was as well known to him as it could be to any one.²

528. Maul, unsuitable for the purpose.—The rule was stated that persons who engage in any employment assume the risks necessarily incident to that employment, and when aware of the dangers connected with it, if they voluntarily use implements which they know, or by the exercise of the knowledge they possess might know, are not so well adapted to the business as other implements, they assume the risk of injury from such source.

This rule was applied where a blacksmith was injured by a piece breaking from a chisel used to cut iron bars. It was alleged that the spike maul he was using to strike the chisel was an improper instrument for the purpose; that it should have been a sledge-hammer with a broader face.³

529. Rope, worn and defective.—The rule was also stated that an employee, who before injury had knowledge of the defects in the tools or implements, or who, having a reasonable opportunity to inform himself, ought to have known of such defects, is to be presumed, by remaining in such employment, to have assumed the risk of such danger; and applied where an employee was injured in a mine by the fall of a

¹ *Gaffney v. J. O. Inman Mfg. Co.*,
18 R. I. 781, 31 Atl. 6.

³ *Houston & Texas Cent. R. Co.*
v. Conrad, 62 Tex. 627.

² *Quigley v. Thomas G. Plant Co.*,
165 Mass. 368.

bucket caused by the breaking of a rope, and where it appeared he was conversant with all the defects and dangers to which he was exposed.¹

530. Steam pipes.—Where a fireman knew the danger incident to letting on steam when there was water in the pipes, it was held he assumed the risk of injury from such cause.²

531. Street-car, defective platform.—The rule was applied to a street-car driver who knew the defect in the platform of the car upon which he stood.³

532. Winch on a vessel.—Where an employee knew that an implement or tool called a winch, used in unloading vessels, was old and insufficient, or inappropriate for the use which was made of it, it was held the risk of injury from it was assumed.⁴

532a. Breaking casting in foundry.—An employee in a foundry was injured by a piece of broken iron being thrown in the process of breaking. It appeared that he was twenty-five feet from the machine; that the method used was raising a heavy iron ball to the roof of the building and letting it drop upon the castings, which was a usual method; that such employee had seen the machine operated for months; that he knew that pieces of iron were ordinarily thrown, but had seen them thrown only a short distance; that he was given warning of the drop of the ball in time to permit him to get to a safer place, and that the machine was in good order and properly operated. It was held that the facts showed an assumption of the risk as a matter of law.⁵

3. Methods.

533. Cars — Broad-gauge on narrow-gauge trucks.—An employee was held to have assumed the risk of the danger from the use by a railroad company of broad-gauge cars

¹ *Patnode v. Harter et al.*, 20 Nev. 303, 21 Pac. 679.

² *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206.

³ *Rogers v. Galveston C. R. Co.*, 76 Tex. 502, 13 S. W. 540.

⁴ *Pingree v. Leyland*, 135 Mass. 398.

⁵ *Wood v. Heiges (Md.)*, 34 Atl. 872.

upon narrow-gauge trucks, where he knew that such method was in use by the company.¹

534. Pushing in front of engine.—Where a brakeman was injured while at work on some flat-cars which were being pushed ahead of an engine, it was said that, if he knew when he entered the service of the defendant that it was the custom of the road to push flat-cars ahead of the engine, he is deemed to have contracted with reference to the custom. But if he was ignorant of such custom at such time, or of facts which ought to have apprised him of it, and the custom was improper and exposed him to unnecessary hazard when he was called upon in an emergency, he did not assume the risk, and his right to recover would depend upon whether he was guilty of contributory negligence.²

535. Shunting unattended in yard.—The mere fact that in a railroad company's yard, where cars are loaded and trains made up, cars are permitted to move along the tracks unattended, is not negligence *per se* as to the servants employed in such yard. This upon the ground that one who undertakes an employment with knowledge of the rules and methods pursued by the master in the business assumes the risks incident to such methods. It was said: If it was the habitual custom of the company to permit the cars to run upon such tracks without a brakeman, and such custom was known to the plaintiff before the accident, then the danger to himself arising out of such custom was one of the risks of his employment, and he could not recover of the company for an injury to himself resulting therefrom.³

536. Shunting on side-track.—A person engaged in making up trains in a switch-yard, who is aware that cars are accustomed to be switched on to a side-track, on which the train is being made up, from both ends, assumes the risk of such hazardous manner of doing the work. But the custom

¹ Titus v. Bradford & C. R. Co.,
136 Pa. St. 618.

² Fordyce v. Lowman, 57 Ark.
160, 20 S. W. 1090.

³ Kelly, Adm'x, v. C., M. & St. P.
R. Co., 53 Wis. 74; Schaible v. L.
S. & M. S. R. Co., 97 Mich. 318, 56
N. W. 565.

to send cars upon such track at the speed of twelve miles an hour is unreasonable, and such an employee will not be held to have assumed the risk of injuries therefrom.¹

537. Shunting without usual signal.—An employee working upon the track in a railroad yard was injured by being caught between cars sent in upon a side-track and a coal shed. The alleged ground of negligence was that, as it was usual and customary for those doing the work of switching to ring the bell when the engine was moving, the plaintiff had the right to assume that cars would not be sent upon the tracks without the usual warning, and that the failure to give such signal upon the occasion in question was negligence on the part of the company.

It was contended further that as the plaintiff only assumed the ordinary risks of the employment, the risk in question was not one assumed, as it was an unusual and extraordinary risk, made so by the failure to observe the usual precautions.

The court sustained these propositions as correct in law.

It should be kept in mind that a statute then in force permitted recovery for the negligence of an engineer.²

538. Shunting against car in which employee is sleeping.—Where an employee who by permission was sleeping in one of the company's cars located upon a side-track was injured by other cars being forced against it, and he knew that the company sometimes used this track for switching cars, it was held he assumed the risk.³

539. Unloading rails from cars while moving.—It was held that switchmen, who were directed by a representative of the company to unload rails from cars which were slowly moving, did not assume the risk of injury from such method, though the danger to be apprehended must have been perfectly apparent. Some force is given to the fact that

¹Caron v. Boston & Albany R. Co., 164 Mass. 523, 42 N. E. 112. Wis. 638; Ditberner v. C., M. & St. P. R. Co., 47 Wis. 138.

²Schultz v. C. & N. W. R. Co., 44 Mich. 299, 47 N. W. 609. ³Jacobs v. L. S. & M. S. R. Co., 84 Mich. 299, 47 N. W. 609.

the service was not strictly in line of his employment. It was said that such an order was unreasonable and dangerous. Upon what principle the decision was based does not appear.¹

540. Coupling moving cars.— It was said: If the customary and usual way of doing the work of uncoupling cars in a railroad yard was negligent and wrong, although permitted by the company, the plaintiff being for the time in command of the train and in part responsible for the custom, he cannot be heard to complain.

This was said where a conductor was injured while in the act of coupling cars while the train was in motion.²

541. Gates and flagmen, absence at crossing.— Where a brakeman was killed while riding in front of an engine by collision with a wagon, caused by failure to maintain gates or signals at a crossing, and he had been employed continuously at that point for three years, and was familiar with the locality and the manner of doing business, it was held that he assumed the risk of injury from such cause. It is said that in engaging in and continuing in the defendant's service for three years with knowledge of the mode of doing the business, the situation of the side-track and crossing, the use of the side-track for storing cars, the obstruction to the view of travelers, and the lack of a gate or flagman at the crossing, he must be held to have assumed the risks that were obvious and incident to his employment in the existing condition of things as the business was conducted with the tracks and crossing located and used as they were. The question is not whether the hazard and danger of the employment might have been lessened by adopting some other method of doing the work at the crossing. It is whether the defendant is responsible for injuries due to a risk which the employee assumed in his contract of service. The case is as if he, by special agreement, had assumed the obvious

¹Palmer v. Mich. Cent. R. Co., 87 Mich. 281, 49 N. W. 613; Same Case, Co., 58 Iowa, 293.
²Ferguson v. Central Iowa R. Co., 58 Iowa, 293.
93 Mich. 363.

risks incident to his employment under the condition of things existing.¹

542. Locomotives; use of road for switching.—Where an employee, serving as a night watchman and engine driver, was injured while making a coupling, the engine at the time being handled by the yard foreman, and being a train locomotive, different in construction from an ordinary switch-engine and not as safe for using in switching, and he alleged as ground for recovery the use of such a locomotive, it was held that, as the plaintiff knew that the engine was less safe than the other kind and the danger was thus apparent, he assumed the risk.²

543. Moving in yard.—Where an employee, working upon tracks in a yard of which there was a large number, was injured by a slowly-moving train, and it appeared he had worked there for some time, was familiar with the manner of operation of trains and engines therein, and that they were almost constantly moving, it was held that there was no negligence under the circumstances. It was said the company were not bound to send a man ahead to give him notice of the approach of the switch-engine, nor give signals, as they would only tend to increase the confusion. That those in charge of the engine had the right to presume that he would use his senses and observe the approach of the engine and cars.³

544. Moving backwards.—Where one applied for the position and was employed as a fireman upon a particular run, and had knowledge that for the want of a turn-table the engine was run backwards three times every day, it was held that he assumed the risk attendant upon such method of operating the train. *Mayes v. Railway Co.*, 63 Iowa, 512, distinguished.⁴

¹ *Bancroft v. Boston & Maine R. Co.* (N. H.), 30 Atl. 409. *Schwabbe*, 1 Tex. App. 573, 21 S. W. 706.

As to custom of leaving cinders on track, see 597, 598. ³ *Aerkfetz v. Humphreys*, 145 U. S. 418.

² *Gulf, C. & S. F. R. Co. v.* ⁴ *Kuhn's Adm'r v. W., I. & N. R. Co.*, 70 Iowa, 561.

545. Coal heaped upon tender.— A track-walker was held to have assumed the risk of injury from coal being heaped upon a tender and its liability to fall while the tender was in motion. It was further held not to be negligence *per se* to load the tender in that manner; that it could not be reasonably anticipated that an accident or injury would be occasioned by such a cause. That under the circumstances it was a pure accident for which no one was at fault.

It was said: If it was negligence to have tacitly allowed the continuance of such a customary way of loading its cars after presumptive notice of it, equally so and more was it negligence of the plaintiff to continue such a dangerous employment after actual knowledge of it, and he certainly had superior means of knowledge.¹

546. Coupling together.— Where the negligence claimed to have been the cause of injury to one of defendant's engineers was the order of defendant to such employee to couple two engines together, tender to tender, and use them in breaking snow, this being claimed to be a dangerous practice, and the undisputed evidence was that this was the general and common practice of the defendant and other roads in the state, well understood by all engineers, including the deceased, and one which they were called upon frequently to engage in, it was held that the dangers incident to such a practice must be held to have been assumed by the deceased as included in the ordinary risks of the employment in which he engaged, and therefore it was error to submit the question to the jury.²

547. Machinery, cleaning while in motion.— Where a weaver in a factory had her fingers caught, while fanning the loom to clean it, while the machinery was in motion, and such was the general custom in all mills, and no injury was known to result from such method except in one instance in another mill, it was held she was not entitled to

¹ *Schultz v. C. & N. W. R. Co.*, 67 Wis. 616.

² *Morse v. Minneapolis & St. Louis R. Co.*, 30 Minn. 465.

recover, as there was no negligence on the part of the defendant and she had knowledge of the custom.¹

548. Trains—Operating in convoys.—Where the method adapted for manning and running trains in convoys was attacked as negligence, the crews comprising an engineer, fireman, brakeman and conductor, it was said: If the employee had knowledge of this custom and practice at the time of his employment and afterwards, and with this knowledge continued for eight or nine months in the employment as a conductor on trains in convoys thus equipped, and also knew that the train which was following him was equipped in the same manner, then such knowledge on his part would prevent a recovery.²

549. Operating without a conductor.—Where an employee was injured by collision of his train with a water train, the latter being operated without a conductor, which omission was charged as negligence, it was said that if he knew it was the custom to run the water train without a conductor, and if an ordinarily prudent person would in his circumstances have known it was dangerous so to operate it, the plaintiff cannot recover on the ground of defendant's negligence in failing to put it in charge of a conductor.³

550. Operating special or wild.—Where a workman voluntarily mounted a hand-car to ride to the next station, and was overtaken by a special train and killed, it was held that no recovery could be had, as he knew that no flags had been sent, and also was familiar with a rule of the company, in effect, that switchmen may expect a train at any time without signals being shown for it.⁴

551. A section-man who had worked more than three months on the track of a railroad where about one-third of

¹ *Gideon v. Enoree Mfg. Co. (S. E. R. Co., 14 R. I. 35; McGrath, C.), 22 S. E. 598.*

² *Balt. & Ohio R. Co. v. State to use of Woodward, 41 Md. 268.*

³ *Gulf, C. & S. F. R. Co. v. Harriett, 80 Tex. 73, 15 S. W. 556.*

⁴ *McGrath, Adm'x, v. N. Y. & N.*

E. R. Co., 14 R. I. 35; McGrath, Adm'x, v. N. Y. & N. E. R. Co., 15 R. I. 95; International & G. N. R. Co. v. Hester, 72 Tex. 40, 11 S. W. 1041; Atchison, T. & S. F. R. Co. v. Martin (N. Mex.), 34 Pac. 563.

the trains passing over the same were irregular or extra trains, not running in schedule time, was held to be chargeable with notice of the practice to run such trains, and hence that he assumed the risk incident to the service from that cause.¹

552. Where one of a gang of section-men was injured by collision with a wild engine, of the approach of which he had no warning or notice, and under circumstances which rendered escape extremely difficult, it was held that such danger was a risk assumed. That a rule which provided that wild trains must run cautiously around curves, looking out for trackmen, had reference to the safety of the train, not trackmen.²

553. Where a repair-man in the defendant's employ was injured by being run into by an extra train while he was on his way to work on a foggy morning, and it was urged the defendant was negligent in its method of running such trains and in not providing for or giving proper warning or signals, it was said that if, with knowledge that the defendant in the management of its road was in the habit of running extra trains without notice, and that it was his duty as one of the repair-men to be always on the lookout for danger from that source, he continued in the defendant's service, he must be considered as having assumed the risk to which he was thereby exposed.³

554. Where a section-hand, while riding upon a hand-car on a foggy morning in the performance of his duties, was injured in collision with a wild or irregular train, and he had knowledge of the custom on the part of the company to operate such trains, it was held he assumed the risk of such method and could not recover.

It was said: No principle is more firmly established than

¹ *Larson v. St. Paul, M. & M. R. Co.*, 43 Minn. 423. 60 Md. 395. See, also, *Larson v. St. P., M. & M. R. Co.*, 43 Minn. 423, 45

² *Sullivan v. Fitchburg R. Co.*, 161 N. W. 722; *Oleson v. St. P., M. & M. R. Co.*, 38 Minn. 117, 35 N. W. Mass. 125.

³ *Pennsylvania R. Co. v. Wachter*, 866.

that the servant assumes all the risks ordinarily incident to his employment, and all risks attending such employment as carried on by the master, known to such servant or which by the exercise of ordinary intelligence and prudence, under the circumstances of the situation, he ought to know. That when a servant of a railway corporation has knowledge of the manner in which its trains are run in respect to anything that may subject persons circumstanced as such servant is liable to be in the performance of his duties to danger of personal injury, he is presumed to assume all the risks of his employment resulting therefrom.¹

555. Flying switches.—It was said that even if it were conceded that a railroad company is guilty of negligence if it allows flying switches to be made, yet if an employee knows of the custom, and without objection participates and aids in making such switches, he waives the negligence of the company and assumes the risk.²

556. Dividing in yard.—Where a section foreman knew of the custom of dividing trains when coming into the yard, each section moving, it was held he assumed the risk of injury from such source, and where he stepped upon the track after one section had passed without looking to ascertain if another was following, it was said that such conduct was negligence *per se*.³

557. Unloading stone.—An experienced employee engaged in unloading stone raised from a wagon and swung into place by a hand derrick was injured by one falling upon his foot. His work was to guide them by a rope. He knew there was danger of the chain breaking. It was not necessary in the performance of his work to get beneath the stone. It was held that he assumed the risk; that his act was careless.⁴

¹ *Hinz v. C., B. & N. R. Co.* (Wis.), 66 N. W. 718.

² *Youll v. Sioux City & Pac. R. Co.*, 66 Iowa, 346; *Coombs v. Fitchburg R. Co.*, 156 Mass. 200.

³ *Haden v. Sioux City R. Co.* (Iowa), 48 N. W. 733.

⁴ *Kilroy v. Foss*, 161 Mass. 138.

4. Premises or Place of Work.

558. Bridge, defect in.—Where a switchman was injured in getting his foot caught in the track in a bridge, an engine moving upon him while thus exposed, and the claim was that the bridge was an unsafe place, it was held there was no error in excluding evidence as to its being unsafe. The bridge had remained in the same condition for two years, and plaintiff had crossed it nearly every day, and knew of its condition.¹

559. Low bridge.—Where a brakeman was injured by contact with a low bridge, it was said that where the service of a brakeman is extra hazardous and dangerous on account of a bridge being of insufficient height, of which he has knowledge, and he continues in the service without objection, the dangers are assumed as incident to the service. The negligence of the master is waived by the employee remaining in the employment without protest or promise of amendment. The master cannot be affected by the rapidity or promptness with which he may be required to act at the time of the accident.²

560. A brakeman was injured while standing on the top of cars by contact with a low bridge. He was at his post of duty, as he was required to watch the rear of a long train and observe that it did not break in two. The court said: He was not chargeable with negligence simply because he did not constantly bear in mind the precise location of his train and where every bridge over the track was.

NOTE.—Nothing is said as to whether the maintaining of a low bridge was negligence nor as to the assumption of the risk. This feature of the case, in view of what was held in *Gibson v. Railway Co.*, 63 N. Y. 49, makes the decision very unsatisfactory.

It further appeared that the company had erected a tell-tale which was out of order in this: that the strings were to some extent wrapped around the beam; also, that the tell-

¹ *Weld v. Missouri Pac. R. Co.*, 39 Kan. 63, 17 Pac. 306.

² *Brossman v. Lehigh Valley R. Co.*, 113 Pa. St. 490.

tale was erected within fifty-four feet of the bridge, and a question was thus presented whether the distance was reasonable and proper.¹

561. Where it appeared that a brakeman who was knocked from the top of a car by contact with a low bridge had been employed on the same portion of the road for several years and knew the height of the bridges, but remained in the service without protest, it was held that he thereby waived the negligence of the company in that regard.²

562. Where an employee entered the employment of a railroad company as brakeman with knowledge of the fact that there were overhead bridges on the road which were dangerous, and of the bridge which caused his injuries, and, having sufficient intelligence to comprehend the danger and how to avoid it, was struck by the bridge while standing upright on the top of a car, it was held that he assumed the risk and could not recover.³

563. Unsafe condition of.—It was said of a baggage-man, if he had notice of the unsafe condition of a railroad bridge over which he was carried, and continued the employment, he assumed the risk. He had knowledge of the danger and it was one of the incidents of the employment. The master is exonerated because the employee himself voluntarily assumes it as increased, and the master is relieved.⁴

563a. An employee working at a forge placed on planks on the upper portion of a viaduct in process of construction, who was injured while walking on stringers from the forge to a ladder which he was required to descend to get coal, in falling therefrom, was held to have assumed the risk of injury from such cause.⁵

564. Building being razed.—It was said that, to maintain an action against the master for an injury resulting

¹Wallace v. C. V. R. Co., 138 N. Y. 302.

⁴Louisville, N. A. & C. R. Co. v. Sandford, 117 Ind. 265.

²Wells v. Burlington, C. R. & N. R. Co., 56 Iowa, 520.

⁵Dehning v. Detroit Bridge & Iron Works, 46 Neb. 556, 65 N. W.

³Goff's Adm'x v. Norfolk, etc. R. Co., 36 Fed. 299.

186.
See 602 et seq.; also PREMISES.

from defective buildings, premises or appliances, two elements must concur, viz.: fault or knowledge on the part of the master, innocence of the fault or ignorance of the danger on the part of the servant.

However gross the fault of the master in subjecting the servant to risk from such causes, yet when the servant knows the defects and danger, and still knowingly and without protest consents to incur the risk to which he is exposed thereby, he is deemed to assume such risk and to waive any claim for damages against the master for injury resulting therefrom.

This was said and the rule applied where an employee, engaged with others in taking down the exposition building in New Orleans, was injured by the fall of trusses.

It was further said: The evidence conclusively establishes that the weakening of the supports of the trusses and the danger of their falling at any moment were apparent and known to every one engaged in the work.

The case of *Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363, was distinguished. The defect there was latent and the particular danger was not anticipated by any one.¹

564a. Removing ensilage from silo.— A laborer was held, as matter of law, to know and appreciate the danger in removing ensilage from a silo in working from the bottom and thus undermining the pile.²

565. Chute for moving heavy timbers.— Where the plaintiff assisted in the construction of a heavy chute for moving large timbers, and had as complete knowledge of its sufficiency for the purpose for which it was constructed as the defendant, and received an injury in the moving of timbers down the chute, it was held that the defendant was not responsible for its alleged unsuitableness for the purpose for which it was built.³

¹ *Carey v. Sellers et al.*, 41 La. Ann. 500, 6 So. 813.

³ *Weeklund v. Southern Oregon Co.*, 20 Oreg. 591, 27 Pac. 260.

² *Welch v. Brainard* (Mich.), 65 N. W. 667.

566. Where an engineer employed at a mine suggested that cleats be nailed onto a chute to facilitate his attending to his duties, and they were placed according to his suggestion, he could not be heard to complain that they were defective and charge the responsibility for his injuries sustained by reason thereof upon the master.¹

566a. Inclosure, animals in.—Where an employee knows that in the inclosure in which he enters to work there are kept deer and elk, he assumes the risk of injury from such animals, unless the employer made misrepresentations as to the character of such animals which induced him to work therein.²

567. Lumber-pile, danger from.—It was held that an employee of a railroad company whose duty with his co-employees was to unload from cars, and stick up in piles in the company's lumber yard, sawed oak timber, deposited there to be used in the manufacture and repair of cars, could not recover damages of the company for an injury received by the falling upon him of an adjoining pile, caused by the negligence of himself and his co-employees.³

568. Mill, saw frame.—Where an experienced sawyer had knowledge of defects in the appliance of which the saw was a part used by him, it was held that he assumed the risk of injury therefrom.⁴

569. Box near place of work.—Where an employee who had been working near a box for several weeks, which contained a substance used in the prosecution of the work in the factory, was injured by falling over it, it was held that he assumed the risk.⁵

570. Well near place of work.—It was said that an employee who is aware of the existence of a well near his place

¹ Hart v. Frick Coke Co., 131 Pa. St. 137.

² Bormann v. City of Milwaukee (Wis.), 67 N. W. 924.

³ Langlois v. Maine Central R. Co., 84 Me. 161.

⁴ Bibby v. Wausau Lumber Co., 80 Wis. 367.

⁵ Balle v. Detroit Leather Co., 73 Mich. 160, 41 N. W. 216.

of work, but ignorant of its purpose, will be held to have assumed the risk of falling into it, and it is immaterial that he did not know the precise extent or character of the injury he would sustain if he fell into the well.¹

571. Cupola of furnace falling.—Where an employee was injured by the fall of a cupola for melting iron in a foundry, where it appeared that the plaintiff had the day before been assisting another employee in making repairs to make the structure safe, and such repairs were not completed, or, if they were, the furnace had not been used since, it was said that the plaintiff was as well or even better informed of the condition of the cupola than his employers. He had an opportunity of knowing the nature of the defects which his employers had not, they not being present, and having this knowledge he must be deemed to have continued in his employment on and about the cupola at his own risk.²

572. Gangway of, obstructed.—The general rule was stated that where a servant has knowledge that the appliances or premises are not safe, he assumes the risk. That when the law imposes a duty upon the master a correlative one is also upon the servant. He cannot continue without objection to use a machine or premises known to him to be dangerous, at the risk of the master.

This rule was applied where the complaint was that the gangway, along which the plaintiff's duty required him to carry molten metal, was obstructed with articles along its sides.³

573. Automatic appliance, defect in.—Where a servant, employed to operate a saw, was injured by the breaking of a wire which, by means of a pulley and a heavy weight, automatically drew up out of the way the saw when not in use, and it appeared he had worked there for three months

¹ Feely v. Pearson Cordage Co.,
161 Mass. 426.

² Bogenschutz v. Smith, 84 Ky.
330.

³ McGlynn v. Brodie et al., 31 Cal.
377.

and was familiar with the machinery, and knew the condition of such wire as to being old, worn and rusty, and he had frequently reported it out of repair, it was held that he must have appreciated the danger, and therefore assumed the risk.¹

574. Trap-door in, used for conveying lumber.—Where a workman in a factory knew of the custom to put lumber through a trap-door in conveying it to the second story from the first, and he was injured while the door was unexpectedly raised by another employee from the floor below, it was held that the risk was one he assumed, and it became immaterial that the method was extra hazardous.²

575. Mines; shattered roof.—Where an employee was injured by the falling upon him of portions of the roof of a mine which he was assisting to prop, and it appeared that he knew the roof was shattered, and was assisting in removing a support, an act entirely voluntary, as the superintendent left it entirely optional with the men to put in an additional timber or remove the one there and put in another, and the men adopted the latter course, and after the timber was removed and some of the men were obtaining the new timber, the plaintiff sat down under the shattered wall, which fell and caused his death, it was held the risk was one which he assumed.³

576. Obstruction, impeding escape from.—The rule was applied where an employee in a quarry was injured, the alleged cause being the leaving of cars in such a position as to impede his safe retreat when setting off a blast. It appeared that at the time of the blast he knew the position of the cars.⁴

577. Track in; absence of safety appliance.—It was held that a miner could not recover for injury received while working in a mine on the ground that the appliance

¹ *Week v. Freemont Mill Co.*, 3 Wash. 629, 29 Pac. 215.

² *Anthony v. Leeret*, 105 N. Y. 591.

³ *Bunt v. Sierra Butte Gold Min. Co.*, 138 U. S. 483.

⁴ *Wilson v. Louisville & N. R. Co.* (Ky.), 18 S. W. 638.

in use (a track) was not properly constructed, or that proper safeguards (blocks or springs) were not used to hold the cars on grade, where he knew the character of the track and that safeguards were not provided.¹

578. Platform — Single plank.— It was said, where the employee knows all about the material furnished, and, being fully aware of its defective and unsafe condition, voluntarily uses it and thereby sustains an injury, he is without remedy.

This rule was applied where a laborer fell from a plank into the river. It appeared from the evidence that he had been engaged for several days upon the same plank and was fully aware of the danger.²

579. Narrow, absence of light.— Where an employee was engaged in the night-time in wheeling a load upon a barrow up an elevated platform but two feet wide, there being no barriers and no lights, and he fell therefrom and was injured, it was held he could not be heard to complain on account of the narrowness of the platform, as he knew its condition and voluntarily assumed the risk. That the absence of torches would not warrant a recovery, as the employer had furnished sufficient for use and the neglect to use them was the neglect of his fellow-servants. That he could not found a right of recovery upon there being a slight depression in the plank, as it was not of such extent as to indicate to a person of ordinary prudence the appearance of danger.³

580. Tracks — Shortness of curves.— It was said that brakemen and other employees who work in such situations must decide for themselves whether they will encounter the hazards incident thereto, and, if they decide to do so, they must be content to assume the risks. It is for those who enter such employments to exercise all that care and caution which the perils of the business in each case demand.

¹ *Heath v. Whitebreast C. & M. Co.*, 68 Iowa, 737.

³ *Kaare v. Troy S. & I. Co.*, 139 N. Y. 369.

² *Sullivan's Adm'x v. Louisville Bridge Co.*, 9 Bush, 81.

The perils in the present case, arising from the sharpness of the curves, were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair and which his employees have every reason to suppose is in proper condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw-bars slipping and passing each other when brought together. It was his duty to look out for this and avoid it. This must have been known to him. It was to be presumed that as an experienced brakeman he did know it, for it is one of those things which happen in the course of his employment under such conditions as existed here.¹

581. Kind of rail.—It was said that a brakeman who continues in the service of a railroad company with knowledge that the guard of a switch is made of T rail cannot recover for the injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that if the guard had been made of different rail it would have been less dangerous.²

582. Close together.—Where an old, experienced railroad man in defendant's service was directed to assist in moving a dead engine in its yard, and while so doing was injured by being caught between that engine and another one that was standing on an adjoining track, the work being done in open day, and plaintiff could see both engines and could judge of the distance between them, and he was not directed to take any particular position in working, it was held that the evidence justified the direction of a verdict for the defendant, since the danger was incident to the service.³

582a. Ash-pit in.—The dangers incident to cleaning cinders from the fire-box of a locomotive from an ash-pit al-

¹Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189; Patton v. Central Iowa R. Co., 73 Iowa, 306.

²Smith v. St. L., K. C. & N. R. Co., 69 Mo. 32.

³Anglin v. Texas Pac. R. Co., 60 Fed. 553 (C. C. A.).

leged to be of insufficient depth are plain and obvious, and an employee so engaged assumes the risk of injury from such cause.¹

583. Failure to construct a culvert.—It was held that an engineer assumed the increased hazard of his employment due to the fact that the road was constructed through a mountainous country, but did not assume the risk caused by fault of construction and maintaining of the road-bed and track, even though liability to accident thereby was increased because the road was built in proximity to mountain ranges. The fact was that sand was deposited upon the track, and the claim was that the company was negligent in not having provided a culvert at that point.²

584. Neglect to fence.—Where a statute made it the duty of a railroad company to fence its track, and made it liable for all injuries to cattle and persons thereon occasioned by failure to construct such fences, it was held that the statute, in case of injury to an employee, excluded the defense of contributory negligence; that the law was not unconstitutional upon that ground, but was within the police power of that state.

To the argument that the injured employee knew that the road was not fenced, and by continuing in the employment assumed the risk, it was said that the most that can be claimed is, if deceased knew that the road was unfenced, and he doubtless did, he would also be presumed to know that the statute protected him in express terms by declaring that the company should be liable for all damages he might sustain occasioned by the want of a fence, and that by continuing the employment he at most only accepted apparent risks and not the possible danger of cattle straying on the track, when it does not appear he knew that cattle were likely to be on the track. To this sufficient answer might be added the further reason that the deceased might well act upon the presumption that the defendant would

¹ *Clay v. C., B. & Q. R. Co.*, 56 Ill. App. 235.

² *Union Pacific R. Co. v. O'Brien*, 49 Fed. 538 (C. C. A.).

proceed to perform, without unnecessary delay, the duty which the statute imposed upon it.

This conclusion was based solely upon the language of the statute.¹

585. The rule that a servant voluntarily entering upon an employment the dangers and hazards of which are known to him must be held to have assumed the consequences of such risks was applied where the employee upon one of the defendant's trains was killed in a collision of such train with cattle on the track, straying there through the company's neglect to provide fences along the line of its road.²

586. In a subsequent case where the circumstances were somewhat similar, except that the negligence claimed was the insufficiency of the fence, and not its absence as in the former, it was held that the effect of knowledge by an employee was a question for the jury.³

587. Where an employee upon a train was injured by his train being derailed, caused by collision with cattle which had strayed upon the track, the right of way not being fenced, it was held that no duty as to its employees devolved upon the company to fence its track. That employees who are employed to operate the road are supposed to contract to operate it in its unfenced condition so far as it is unfenced.⁴

588. Where a statute provided in terms that any corporation which has failed or neglected to fence its road shall hereafter be liable for all damages sustained by any person in consequence of such failure or neglect, it was held that an employee upon a train, injured by reason of his train colliding with cattle upon an unfenced track, could not recover. It was said: If the servant enters upon and continues in the service of the company with knowledge of the unsuitableness or inadequacy of the instrumentalities furnished for the operation of the road, it is his own negligence, and he as-

¹ Quackenbush, Adm'x, v. Wis. & Minn. R. Co., 62 Wis. 411.

³ Magee v. N. P. C. R. Co., 78 Cal. 430.

² Sweeney v. Cent. Pac. R. Co., 57 Cal. 15.

⁴ Patton v. Central Iowa R. Co., 73 Iowa, 306.

sumes the known risks of his employment, and the consequent exemption of the master in such cases is well settled in the law.¹

589. Where, through the failure of a railroad company to erect and maintain sufficient fences as required by the statute (Missouri, sec. 2611), an animal came upon the track, causing the derailment of the train and injury to an employee, it was held that the statute applied to such employees so far as to afford them its protection, and that it did not exclude the defense of contributory negligence. The effect of knowledge by the employee of such neglect upon his right to recover was not discussed.²

590. General bad condition of.—Where a section-man was injured by reason of his hand-car leaving the track, owing to the bad condition of the track, the rails being considerably worn and battered, of which he had knowledge, it was held that he took the risk incident to its general condition, and it matters not whether he knew of the particular defect in the track which caused the injury or not.³

591. Ditches in.—The rule was stated that a person who has accepted service with full knowledge of the character and position of structures from which he may be liable to injury, in case of injury resulting therefrom cannot maintain an action against his employer for indemnity. He assumes apparent risks, and cannot call upon his employer to make alterations to secure greater safety.

This rule was applied to an employee, employed as a switchman and car-coupler in a freight yard which was drained by a system of small open ditches running across the tracks between the ties, and which were existing at the time the plaintiff entered the employment, all of which was known to him, who was injured while coupling cars by rea-

¹ Fleming, *Adm'r. v. St. P. & D. R. Co.*, 27 Minn. 111. As to master's duty in respect to fencing track, see 3039 et seq.

² Atchison, *T. & S. F. R. Co. v. Reesman*, 60 Fed. 370 (C. C. A.). ³ *Green v. Cross et al.*, 79 Tex. 130, 15 S. W. 220.

See, also, *Donnegan v. Erhardt*, 119 N. Y. 468.

son of stepping into one of such sluices. It was held that the risk was one assumed. The court distinguishes *Plank v. Railway Co.*, 60 N. Y. 607.¹

592. In that case the employee was injured by stepping into a trench only partially covered by a plank, in the night-time, while coupling cars. His work at the place had been occasional only, not frequent, and it was not shown that he had actual knowledge of the existence of the trench.²

593. Space in unfinished planking.— Where an employee was injured by falling through a hole in the roadway, left unplanked, and it appeared that the defendant was engaged in the planking of the same, which was a new structure, and plaintiff was familiar with the fact that the spaces between the tracks were not completely covered, it was held that he could not recover; that the defendant had the right to use the structure and ask its employees to work thereon before it was completely planked over; and if with full knowledge of the fact the employee consented to do his work at that place, he assumed the risk consequent thereon.³

594. Wires in uncompleted blocking system.— Where a yard-master in a freight yard was injured while attempting to cross tracks in front of a rapidly moving train by his foot getting caught under some unboxed wires, a part of an interlocking system, not yet completed, which he knew were there, and it appeared he was familiar with the yard and the manner of operating trains in it, it was held that the risk was one he assumed.⁴

595. Damaged by freshet.— Where an employee upon a construction train which had been sent out for the purpose of repairing the track, which had been damaged by wash-outs caused by a severe storm, was killed by the ditching of the train, and he knew that the purpose of the train was

¹ *De Forest, Adm'r, v. Jewett*, 88 N. Y. 264.

² *Plank, Adm'r, v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 607.

³ *Kennedy v. Manhattan R. Co.*, 145 N. Y. 288.

⁴ *Horne v. Old Colony R. Co.*, 161 Mass. 180.

an errand of danger, it was held that he assumed the risks incident to the passage over the track.¹

596. It was held that a shoveler sent out to clear the track from obstructions caused by land-slides, the result of a severe storm, did not assume the risk of a defect in a bridge over which he was to pass, even if caused by the same storm. That it was the duty of the company to have inspected it and learned its condition before sending the train out. That the employees had a right to assume that the bridge was safe.²

597. Cinder pile in.— It was held that a brakeman, who was injured by tripping upon a cinder pile in defendant's yard, thus being unable to avoid a train from moving upon him, where it was alleged that the defendant was negligent in permitting such obstruction and in not providing proper lights in said yard, and it appeared that he knew of the existence of such pile of cinders, and also that the yard was dimly lighted, the only light being such as was afforded by the head-light upon engines and lanterns of trainmen, did not as matter of law assume the risk.

We are left in the dark as to the ground of this decision.³

598. If an employer's unsafe and careless custom of doing business is open to observation so that it can be readily observed by the senses, and the employee has ample and reasonable means of using his senses for the purpose of observing the custom, it is his own fault and negligence if he does not observe it, and he stands upon the same footing as if he had actual knowledge of the custom referred to. As to him, the risk of such custom is his own and not that of the employer:

This was said where a night brakeman in one of the defendant's yards, while coupling cars, slipped and fell upon a pile of wet ashes, which, according to defendant's custom, had

¹ Vaughn v. Cal. Cent. R. Co., 83 Cal. 18. Knahtla v. Oregon, S. L. & U. N. R. Co., 21 Oreg. 136, 27 Pac. 91;

² Conlon v. Oregon, S. L. & U. N. R. Co., 23 Oreg. 499, 32 Pac. 397; Conlon v. Oregon, S. L. & U. N. R. Co., 21 Oreg. 462, 28 Pac. 501.

Carlson v. Oregon, S. L. & U. N. R. Co., 21 Oreg. 450, 28 Pac. 497; ³ St. Louis & S. F. R. Co. v. Doyle (Tex. App.), 25 S. W. 461.

been taken out of the fire-box of an engine and dropped upon the track. A verdict for the defendant was sustained.¹

598a. Where an employee was injured while coupling cars by falling over piles of cinders left in the center of the track, which were from four to eight inches in height, and it appeared he had no knowledge of their existence; that they were partially covered with ice and snow, and that, though it was in the day-time, it was somewhat dark and sleet was falling, it was held that it could not be said as matter of law that he assumed the risk of injury from such cause.²

598b. Stones.—Where a brakeman was injured in a railroad yard, as was alleged, by cobble-stones being left on the tracks, and he was aware that gravel trains from which they fell were in the yard, and it appeared that the custom on the part of the company was to clear the yard from stones that fell from gravel trains from time to time, and that the employee went to work at midnight, it was held that it could not be said as matter of law that he assumed the risk of injury from such cause.³

599. Obstructions near.—Where the head brakeman of a train was injured by contact with lumber-piles near the track as he was ascending the ladder of a car, having knowledge that such piles were there, it was said that, when a person enters upon a dangerous employment, he not only assumes the risk ordinarily incident thereto, but also the risks he may incur from manifest perils.

To the argument that he may not have known the precise distance of the lumber from the track, it was said: He had seen it with an experienced eye and took his chance; he misjudged. There was no hidden defect or sudden call to act in an emergency outside of his duty.⁴

600. Where a switchman was killed by stepping into a dry well by the side of the track, partially covered by a car-

¹ Hughes v. Winona & St. Peter R. Co., 27 Minn. 137.

³ Fish v. Illinois Cent. R. Co. (Iowa), 65 N. W. 995.

² Kennedy v. L. S. T. & T. R. Co. (Wis.), 66 N. W. 1137.

⁴ Gaffney v. N. Y. & N. E. R. Co., 15 R. I. 456.

door which was in a path used by such employee, it was held that, as the deceased knew of the condition of the premises, his administrator was not entitled to recover.¹

601. Passage-way across.—The rule was applied to a carpenter injured in attempting to cross the yard between cars where there were many tracks. It was said: If the failure of the company to provide a safe passage-way was negligence, the deceased, by remaining in the employment with knowledge of the danger, in attempting to cross voluntarily assumed the risk, and a direction of a verdict for defendant was proper.²

602. Structures near.—It was stated that an employee upon a railroad assumes the risk of all constructions necessary and reasonably adapted to the business of the railroad. This was said where an employee was injured by contact with a mail-crane erected close to the track.³

603. Where a switchman was upon the platform of a car which was being switched on a side-track, and as he leaned outward from the steps to avoid water which was dripping from a steam-pipe from the end of the car, he was struck by contact with a shed which was twenty-two and one-half inches from the car, it was held that it could not be said as matter of law that he was guilty of contributory negligence. The court do not seem to have considered the question of assumed risk as involved, and the statement of the facts does not present what knowledge or means of knowledge the plaintiff had of the closeness of the structure.⁴

604. Where a railroad company erected a coal platform between two of its tracks so near to one track that a passenger-car moving along the track passed within seven inches of the platform at one end, and four and one-half inches of

¹Needham v. Louisville, etc. R. Co., 85 Ky. 423.

For other cases relating to obstructions, see 2968 et seq.

²Lord v. Pueblo S. & R. Co., 12 Colo. 390, 21 Pac. 148.

³Sisco v. L. & H. R. Co., 145 N. Y. 296.

⁴Kelleher v. Milwaukee & Nor. R. Co., 80 Wis. 584.

it at the other end, and a baggage-man in the employ of the company who was familiar with its location, having assisted in making up trains every day for two years, was forced off a car by contact with it, it was held that he had assumed the risk of injury from such source. The facts brought the case within the general rule, which was applied.¹

605. A brakeman was injured while ascending a car by contact with a cattle-chute maintained close to the track. He had been in the service, passing it almost daily, for several months. He knew that it and others at adjacent stations were close to the track, but claimed he did not know it was as close as it in fact was. It was held that whether he had assumed the risk was a question proper for the jury.

The court said: "If he knew or ought reasonably to have known the precise danger to him in the course of his employment of the cattle-chute, and saw fit, notwithstanding, to continue in his employment, he might be held to have assumed the extraordinary risk of the service; but it appears to us that the consequence of acquiescence ought to rest upon positive knowledge or reasonable means of positive knowledge of the precise danger assumed; and there might be serious difficulty in applying the principle to a case like this; . . . and it appears to us very doubtful whether persons operating railroad trains and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof of knowledge, to be charged with notice of the precise relation of such objects to the track."²

606. A fireman upon a locomotive was killed by contact with a cattle-chute, located thirteen inches from the cab, while leaning out of the cab window. He passed the structure twice a week for nearly sixteen months. It was held that where a cattle-chute is constructed in dangerous proximity to a track, the defect is not one of the risks assumed

¹ *Perigo v. C., R. I. & P. R. Co.*, 52 Const. Co., 42 Wis. 583. Compare *Iowa*, 276. *Gaffney v. N. Y. & N. E. R. Co.*, 15

² *Dorsey v. Phillips & Colby* R. I. 456.

by a fireman. That it did not follow that, because he could see the chute for half a mile on the track, that he could know the exact distance in inches from the track; nor would such fact render a finding, in effect that he had no opportunity to know the danger, inconsistent. Nor is such finding inconsistent with a rule of the company that train and engine-men must familiarize themselves with tracks at dangerous points upon the line. Such employees may rely upon the presumption that such structures are not erected so as to endanger the lives of employees and that they are maintained with due care. That no duty devolved upon the fireman to inspect and determine the distance the chute was located from the track.¹

607. Where a brakeman was killed while on a train by contact with a cattle-chute close to the track on a siding, it was said that the trial court, instead of leaving the question to the jury, should have declared, as matter of law, that he had assumed the risk, it appearing that for nearly two months he had passed almost daily, and sometimes several times a day, the point at which the accident occurred, and had taken cars out of the siding before.²

608. It was said: An open and visible risk is one so patent, that one familiar with the business would instantly recognize it. It is a risk about which there can be no difference of opinion in the minds of intelligent persons accustomed to the service. The servant is expected to observe such objects only, in the absence of notice, as would in an instant convince him of their danger. It is not expected of a switchman that he should carefully measure the distance between a switch target and a rail. This is the duty of the master, and the servant has a right to assume that a target or other obstruction is at a reasonably safe distance, in the absence of anything to excite special apprehension.

This was said where an employee was injured by contact

¹ New York, C. & St. L. R. Co. v. Ostman (Ind.), 41 N. E. 1037. ² Boyd v. Harris (Pa. St.), 35 Atl. 222.

with a switch target located about twenty inches from the car. He had been employed in the yard about two weeks.

It is further said: While he must have known of the existence and location of the switch target, he may not have known from observation that it was near enough to the cars to be dangerous.¹

609. Where an employee was injured by contact with a signal post in the defendant's yard while ascending the ladder of a box-car, it was held that whether he assumed the risk or was negligent were proper questions for the jury. It was said: But he had been employed there for two weeks or more and had had occasion to pass by it many times a day, and it was an object so prominent and so essential in the service in which he was engaged that his attention must have been frequently drawn to it. We are not prepared to say, however, that this is conclusive evidence that he was negligent, or that he knew, or should have known if he used ordinary prudence, the danger of such an accident. While he must have known of the existence and location of the post, he may not have known that it was near enough to the track to be dangerous.²

610. As a place for wiping engines.—Where an employee, wiping an engine upon a track, was injured by another engine or car being pushed against it, and it appeared he knew of the existing conditions as to place, appliances and means of doing the work, it was held that the risk of injury from such causes was assumed. It was said that a servant is bound to see patent and obvious defects in the instrumentalities with which he works, and when he goes into the service of a person, or continues therein, with full knowledge that the instrumentalities employed have obvious defects, he takes the risk of their use upon himself.³

¹ Johnston v. Oregon, S. L. & U. N. R. Co., 23 Oreg. 94, 31 Pac. 283. ures near track see PREMISES, 2974 et seq. See, also, 735 et seq.

² Johnson v. St. Paul, M. & M. R. Co., 43 Minn. 53, 44 N. W. 844. ³ South Florida R. Co. v. Weese, 32 Fla. 212, 13 So. 436.

For other cases relating to struct-

611. Trestle, coupling cars on.— Where a brakeman, whose duties required him to couple cars upon a trestle that were sent to him upon being weighed, slipped upon the trestle while a car with more than usual momentum was sent to him, and he was injured in being caught between the cars, it was held that the question of defendant's negligence as to the place and method was immaterial, as it appeared that the danger was obvious and known to the plaintiff, and he therefore assumed the risk.¹

612. Side-tracks, character and condition of.— Where an employee of a railroad company was injured while riding on a construction train, caused, as was alleged, by the defective condition of a side-track, it was said: If plaintiff knew the manner in which the side-track was constructed he assumed the risk necessarily incident to such construction. In riding on the train he consented to and accepted the incidents usual to such a train. He cannot recover for injuries resulting from the condition of the side-track if the same was constructed in the usual way, though the grade was imperfect or uneven and the track unballasted. But if through failure to spike the rails, or neglect to keep the track in suitable repair for the temporary purposes for which it was constructed and used, an injury occurred to one lawfully on the train, without fault on his part, he would be entitled to recover.

The defect complained of by the plaintiff arose chiefly from the fact that the rails were not properly spiked to the ties.²

613. Where an employee was injured by his foot getting caught by a splinter on a worn rail used in a side-track, it was said: Upon the question of the assumption of the risk by him, if he knew, or by the use of ordinary observation

¹ Woods v. St. Paul & Duluth R. Co., 39 Minn. 435, 40 N. W. 510.

² Rosenbaum v. St. Paul & Duluth R. Co., 38 Minn. 173, 36 N. W.

447.
For other cases relating to condition and character of tracks see PREMISES, 2938 et seq.

and care ought to have known, that the defendant's side-track at this station was composed of rails so worn and splintered as to be dangerous, he would be deemed to have assumed the risk incident thereto, if he also knew and appreciated (or ought to have done so) the nature and extent of the danger.¹

614. Tunnel not properly ventilated.—Where a railway employee was killed by the smoke and gas in the defendant's tunnel, which was not properly ventilated, and it appeared that he continued in the employment with full knowledge of such conditions, it was held that he assumed the risk.²

5. Safeguards.

615. Cogs and gearing, exposed — Statute.—The absence of guards required to be placed upon all gearing and belting in a factory in which women and children are employed (sec. 11, ch. 462, Laws of 1887, amending ch. 409, Laws of 1886) imposes no liability upon an employer in cases where an infant employee, knowing of their absence, voluntarily meddles with the machinery and is injured.³

616. Where an employee engaged in a room of a factory where there were revolving shafts, belts and pulleys was injured while moving a box, in backing towards such machinery and becoming caught in the shaft, and it appeared he was familiar with their location and knew they were dangerous if too closely approached, it was held that he could not recover; that a verdict was properly directed for the defendant.⁴

617. Where an experienced employee was injured by contact with gearing which had been covered, but some weeks prior to the accident the boxing became broken, which was

¹ *Doyle v. St. Paul, M. & M. R. Co.*, 42 Minn. 79.

For other cases relating to the character and condition of side-tracks, see *PREMISES*, 2950 et seq.

² *Balt. & P. R. Co. v. State* to use of Abbot, 75 Md. 152, 23 Atl. 310.

³ *White v. W. Lithograph Co.*, 131 N. Y. 631.

⁴ *Beck et al. v. Firmenich Mfg. Co.*, 82 Iowa, 286, 43 N. W. 81.

known to such employee, yet with such knowledge he continued to use such machine without complaint until the time of his injury, it was held he had assumed the risk and could not recover. It was said: Failure to cover gears is not negligence. A manufacturer has a right to keep a machine in use after it has become old and defective, unless its defects expose the operator to some latent or extraordinary danger.¹

618. It was said: Where a workman is employed to do certain work with a machine which he fully understands, though it may not be of the newest pattern, and may require more care than newer patterns, but nevertheless is in perfect order of its kind, he takes the risk of all accidents which may befall him in its use.

This was said where the appliance had no covering over the cog-wheels, though such appliances as were then customarily made were provided with such safeguards.²

619. It was said that an experienced employee who works with a machine knowing the cogs are uncovered voluntarily assumes the risk of injury from that source.³

620. The rule was applied, and an employee in a mill held to have assumed the risk incident to the use of what is termed a bull-wheel which was not covered or protected. It was said the danger therefrom was as obvious to him as any one.⁴

621. Draw-bar, absence of appliance to secure coupling-link.—Where the servant knew there was not an appliance upon an engine to keep the coupling-link from running back, and he comprehended the danger, it was held that he assumed the risk.⁵

¹ *Kelley v. Silver Spring B. Co.*, 12 R. I. 112.

² *The Serapis*, 51 Fed. 91 (C. C. A.), reversing *Same Case*, 49 Fed. 393.

³ *Schroeder v. Mich. Car Co.*, 56 Mich. 132, 22 N. W. 220; *Foley v. Machine Works*, 149 Mass. 294.

For other cases, see 765 et seq. See, also, *APPLIANCES, KIND; SAFEGUARDS AND PRECAUTIONS.*

⁴ *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812.

⁵ *Chicago & Alton R. Co. v. Munroe*, 85 Ill. 25.

622. Flags, omission to furnish to car repairer.—It was said where a railroad company calls upon an employee to go under a car on a side-track on which other cars are liable to be moved or switched, to repair such a car, it is its duty to provide him with a red flag as a danger signal; but if such person is an old railroad employee and fully aware of the danger, and had continued for months to perform such duties and neglected to demand and procure a flag, he may be considered as having waived his right to recover for any injuries received in consequence of such neglect.¹

624. Frogs unblocked; statute.—Notwithstanding a statute requires the blocking of switches and guard-rails, an employee who voluntarily attempts to uncouple moving cars, in violation of a known rule prohibiting him from going between cars to couple or uncouple them, cannot recover if injured by his foot getting caught in an unblocked frog.²

625. It was said that the use of unblocked frogs was a risk assumed by a servant in entering the service of a railroad company where the method of blocking frogs was not in use.³

626. Where an employee was injured by reason of his foot getting caught in an unblocked frog, he knowing its character and appreciating the liability of being caught in it, it was held that he assumed the risk.⁴

627. Where the contention was that the brakeman, who was injured by his foot getting caught in an unblocked frog, must have had knowledge that some of the frogs in the yard were unblocked, and therefore he assumed the risk, it was said that the evidence was not conclusive that blocks, from being worn or otherwise, were removed and not re-

¹ O'Rourke v. Union Pac. R. Co., K. & T. R. Co. v. Thompson (Tex. App.), 32 S. W. 191.
22 Fed. 189.

² Grand v. Mich. Cent. R. Co., 83 Mich. 564, 47 N. W. 837. ⁴ Southern Pac. R. Co. v. Seeley, 152 U. S. 145; reversing Same Case,

³ Lake Shore & M. S. R. Co. v. McCormack, 74 Ind. 440; Missouri, 6 Utah, 319, 23 Pac. 751; Coates, Adm'x, v. Bur., C. R. & N. R. Co., 62 Iowa, 486.

placed in instances sufficiently numerous to become the rule, or show that the mode of doing business in that yard was to leave the frogs unprotected to such extent that deceased must be presumed to have known of it and assumed the risk, that the question should be taken from the jury.

If the general custom was to protect frogs, the employee had a right to assume, in the absence of notice to the contrary, that the defendant had acted according to the general rule or custom in respect to any particular frog, although he may have known of some instances in which it had not done so. A single instance or number of instances, not amounting to a custom or mode of business, of culpable negligence on the part of a master, will not cast on the employee the risk of subsequent or other similar acts of negligence.

This case is therefore distinguishable from *Hughes v. Railway Co.*, 27 Minn. 137.¹

628. Guards, absence of.—Where an employee had some experience in working upon a machine similar to the one which caused him injury, and knew there was no automatic guard on the machine and no way of preventing the head-block from coming down if the machine was out of order, it was held that, having assumed the risk of operating the machine without a guard, the plaintiff could not claim after injury that one should have been put on.²

628a. Where the conductor of an electric car, in falling from the car, was injured by his feet getting upon the track, and the gravamen of the complaint was a failure on the part of the company to construct the car with a guard extending outside of the wheels, it was held that the manner of construction of such cars was open and obvious, and was either known to such employee or would have been known had he

¹*Sherman v. C., M. & St. P. R. Co.*, 34 Minn. 259. APPLIANCES, KIND, 767 et seq.;
SAFEGUARDS AND PRECAUTIONS.

For other cases see 175 et seq.; ²*Toomey v. Donovan*, 158 Mass. 232.

exercised ordinary diligence; and therefore by voluntarily continuing the service with knowledge or means of knowledge equal to that of his employer he assumed the risk.¹

629. Misplaced by employee.—Where an experienced employee operated a saw with a guard so placed by himself as to be dangerous, and different from the manner it was designed to be and in which he was directed to place it, it was held he could not recover for injuries received by means thereof.²

630. Light, absence of in round-house.—Where an employee, while asleep in one of the stalls of a round-house, which was a customary place for such employees to sleep, in moving his position while so asleep placed his foot upon one of the rails and was run over by an engine coming in, and it was charged that the injury was due to the neglect of the company to provide proper light, it was held that, as he knew such round-house was not lighted and had no reason to expect it would be on the night he received his injury, and was aware of the danger to which he exposed himself, that the risk was one assumed.³

631. Absence of at coal chute.—It was held that a laborer, who had been employed several nights loading coal at a coal chute, so that he was familiar with the premises and knew the location of the chute and was accustomed to operate the cars, assumed the risk of being caught between the chute and a moving car upon which he was standing, where the light was sufficient for him to perform his duty of assorting coal, and at the time of the accident he had his back to the chute and could have seen it had he looked.⁴

632. Railing, absence of at elevator hole.—Where an employee knew of the existence of an elevator hole in a dark basement, where he was sent to do a temporary work, and while having its existence in mind he fell into it, it was

¹ Denver Tramway Co. v. Nesbit (Colo.), 45 Pac. 405.

² Cluny v. Cornell Mills, 160 Mass. 218.

³ Price v. H. & St. J. R. Co., 77 Mo. 508.

⁴ Quibell v. Union Pac. R. Co., 7 Utah, 122, 25 Pac. 734.

held that he assumed the risk of injury therefrom, though the master's duty might have required that it be protected and made more safe.¹

633. Absence of at hole in floor.—It was said that if an employer takes reasonable care to provide a safe room for his employee to work in, it is all the law requires of him; and if the employee has knowledge that the room is unsafe, and in the course of his employment continues to use it without notifying his employer of its unsafe condition and without asking him to repair or remedy it, he voluntarily accepts the risk, and cannot, in case of injury from such cause, recover damages therefor. So held where a small hole in the floor of a building was left partially unguarded while changes were being made.²

634. It was said that the risk of falling into an uncovered opening in a floor of a building having no possible connection with the business carried on in a factory cannot be said to be a risk incident to the business which an employee assumes, but rather incident to the place where the business is carried on; hence an employee who was injured by falling into such an opening, the existence of which he did not know, cannot be said to have assumed the risk.³

635. Absence of on platform.—It was held that an employee assumed the risk from the want of a railing upon a platform where he was at work assisting in storing ice in a house; the absence of the railing and the risks consequent thereto being as well known to him as to the employer.⁴

636. Watchman, absence of on rear car.—It was said: If a servant of a railroad company remains in the employment of the company when he knows that the performance of the duties required of him will expose him to danger from the want of a watchman on the rear car of trains in the company's yards, or from the want of a sufficient number

¹Taylor v. Carew Mfg. Co., 140 Mass. 150; S. C., 143 Mass. 470.

²Wannamaker et al. v. Burke, 111 Pa. St. 423.

³Hoffman v. Clough, 124 Pa. St. 505.

⁴Moulton v. Gage et al., 138 Mass. 390.

of hands to operate trains, it will be held that he assumed the risk, and waived whatever obligation, if any, rested on the company in that respect.¹

636a. It was held that employees whose duties are to repair cars on the tracks do not ordinarily assume the risk of injury from the car being moved by other cars being pushed against one upon or under which one such is at work, as it is a duty the company owes them, while in the performance of such work, to provide means to protect them if danger may come from that source.²

636b. Upon a second trial it appeared the company had provided watchmen to warn him of such danger, and that his injuries were attributable to their neglect. It was held that as to such duties they were his fellow-servants.³

637. Where a civil engineer in the defendant's employ charged with the duty of looking after the buildings and maintenance of bridges, trestles, etc., while traveling upon the road in a Pullman car was killed by an accident caused by the collapse of a burning bridge at a part of the track where no track-walker or watchman was employed, it was held that he assumed the risk of injury from the failure to provide a watchman; that he had knowledge that one was not provided, and was negligent himself in failing to provide one.⁴

638. In another case growing out of the same accident, brought by the representatives of the engineer, it was said: He knew, or with the exercise of the ordinary care incumbent upon him in his employment would have known, and must therefore be presumed to have known, the customary daily watch that was kept on the track and bridges, and that there was no track-walker kept on that part of the track or watchman kept at this bridge. He knew and

¹ Chicago & N. W. R. Co. v. Donahue, 75 Ill. 106; Chicago & Eastern Ill. R. Co. v. Geary, 110 Ill. 383.

² Luebke v. C., M. & St. P. R. Co., 59 Wis. 127.

³ Luebke v. C., M. & St. P. R. Co., 63 Wis. 91.

⁴ Texas & Pac. R. Co. v. Smith, 67 Fed. 524 (C. C. A.).

understood the features and working of the engines, and the character and extent of the watch that was kept on that bridge. He therefore assumed the risk of being injured by the use of such machinery on the track and bridges thus watched.¹

D. Presumptive Knowledge — Opportunity to Discover.

1. Rule.

639. A servant entering into an employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and when he accepts or continues in the service with knowledge of the character of defective structures and of the dangers which may be apprehended, he assumes the hazards incident to the situation.²

640. A servant assumes not only the risks incident to his employment, but all dangers which are obvious and apparent, and so, if he voluntarily enters into or continues in the service, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risks and to waive any claim for damages against the master in case of personal injury.³

641. If a person specially undertake to perform a peculiarly perilous work by operating a machine obviously wanting in suitable appliances for safety, knowingly and voluntarily, he cannot afterwards complain, in case of injury in consequence thereof, that the machinery was of a dangerous kind, and that it was wanting in appliances reasonably necessary to render it safe. So, upon analogous principles, if an employee, after having a fair and full opportunity to become acquainted with the risks of his situation, makes no complaint whatever to his employer as to the machinery,

¹Texas & Pac. R. Co. v. Minnick,
61 Fed. 635 (C. C. A.).

³Crown v. Orr et al., 140 N. Y.
450; Davidson v. Southern Pac. R.

²Davidson v. Cornell et al., 132
N. Y. 228. Co., 44 Fed. 476.

which he knows to be wanting in appliances for safety, he cannot complain if injured by the exposure.¹

642. Where an employee, after having had the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by such exposure. By contracting for the performance of hazardous duties, he assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has opportunity to ascertain.²

643. Where a servant works with or in the vicinity of a piece of machinery insufficient for the purpose for which it is employed or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of accidents resulting from such defective condition of machinery.³

644. A workman is presumed to know whether the machinery operated by him is safe or unsafe, and what effect its operation is likely to have upon surrounding objects; want of reasonable care in ascertaining these facts will constitute negligence on his part.⁴

644a. Where an employee has knowledge of the defect in an appliance which has been furnished for his use, the fact that the appliance was not so dangerous as to make it patent to him that it could not be used without danger will not relieve him from an assumption of the risk, and knowledge of the defect on his part will be presumed when in the exercise of ordinary care he should have discovered it.⁵

645. The general rule applies to perils and risks not incident to the service of which the servant has notice, unless he

¹ Rummell, Adm'x, v. Dilworth, 109 Pa. St. 246. See, also, Baker v. 111 Pa. St. 343. Western, etc. R. Co., 68 Ga. 699;

² Brossman v. Lehigh Valley R. Co., 113 Pa. St. 490. Bell v. Western, etc. R. Co., 70 Ga. 566.

³ McGlynn v. Brodie et al., 31 Cal. 377. ⁵ Missouri, K. & T. R. Co. v. Wood (Tex. App.), 35 S. W. 879.

⁴ Reading Iron Works v. Devine,

has been induced to accept the service by the promise or understanding of the master to remove the cause and he has failed to do so.¹

2. Appliances.

646. Anchorage in a building.—Where a servant was injured by the giving way of an anchorage constructed at the head of stairs to be used in connection with ropes and pulleys to move a large safe, it was held that it did not appear that the appliance was so glaringly and palpably inadequate as to charge him with knowledge, and he was therefore justified in supposing that such skill, prudence and foresight had been employed in its preparation as to render it safe.²

647. Belt fastenings, character of.—It was said in reference to the charge of the trial court as to the use of certain appliances called clamps for fastening belts, that the court should have charged that the defendant was only bound to use ordinary care in furnishing machinery, and that if there was more danger in the use of these clamps than those in common use, and if plaintiff knew it, or might have known it by the exercise of such care as a man of ordinary prudence and care would have used under like circumstances, he could not recover for injuries caused him. The principle was stated that if plaintiff knew the risk, if there was any, in using the belt, or if its defects were patent and open to common observation, he would be held to have assumed the risk with others incident to the employment.³

648. Buggy used in an iron mill.—Where the liability of the master was predicated upon an allegation that the employee was injured while pushing a buggy in a mill, loaded with iron rails, by reason of some of the rails falling off, caused by the want of pins in the holes provided on the

¹ Little Rock & Fort Smith R. Co. v. Duffey, 35 Ark. 602.

³ Nix v. Texas Pac. R. Co., 82 Tex. 473, 18 S. W. 571.

² Bradbury et al. v. Goodwin, 108 Ind. 286.

buggy, and also that the holes were so worn that pins could not be used, it was held that as it appeared the buggy was one of many that the workmen might select from, and the defect was apparent at a glance, that the workmen who loaded the buggy and the plaintiff who assisted in working it were bound to know that the pins were absent.¹

649. Cars, brake defective.—It was held, where a brakeman had but a few moments to become acquainted with the character and condition of a brake and determine whether he could safely use it, during which time he was engaged in coupling cars and other duties, it could not be said as matter of law that he was guilty of contributory negligence in its use.²

650. Bumper defective.—It was held that a brakeman injured by a defective bumper was entitled to recover, even though by the use of ordinary care he might have discovered, but in fact was ignorant of, such defect, where the defect was not hidden.³

650a. Where chalk marks have been placed upon a car, indicating that the car is in bad order, this of itself is not conclusive upon the question of notice to a brakeman, injured in attempting to couple such a car, of defects in the bumpers.⁴

651. Couplings, defective.—It was held that an experienced brakeman assumed the risk of a defect in the coupling apparatus that he might have discovered upon paying proper attention, and especially where he was required by a rule of the company to take time and examine all machinery before exposing himself to danger.⁵

652. Where a brakeman, injured in the act of coupling cars, did not have actual knowledge of the defective construc-

¹ Bemisch v. Roberts, 143 Pa. St. 1.

² Philadelphia & Reading R. Co. v. Huber, 128 Pa. St. 63.

³ Evans v. Chamberlain, 40 S. C. 104.

⁴ Chesapeake & Ohio R. Co. v. Lash's Adm'r (Va.), 24 S. E. 385.

⁵ Karrer v. Detroit, G. H. & M. R. Co., 76 Mich. 400, 43 N. W. 370; Brewer v. Flint & P. M. R. Co., 56 Mich. 620, 23 N. W. 440.

tion of the coupling appliances, it was held that he had not assumed the risk.¹

NOTE.—The court seemed to decide that no duty devolved upon the employee to ascertain the character of such appliance, but that he might with perfect assurance rely upon its being perfectly safe.

653. Of uneven height, coupling.—Where an inexperienced brakeman was injured while making the attempt to couple a car to a caboose, the draw-heads being of unequal height, which rendered the act very dangerous if attempted with a straight link, and it appeared he did not know that such act required the use of a crooked link, and he used the former, it was held that a recovery would not be defeated on the ground that the defect was obvious, where he was compelled to act with haste.

This decision seems to be ruled by the doctrine of contributory negligence, as the court state that whether he used due care and diligence in coupling the cars was a question for the jury, in view of the circumstances.²

654. It was held that a switchman whose duty it was to manage switches and couple cars at certain stations assumed the risk of coupling all cars which came to him in good order, though the coupling device in some may be radically different from that upon others. He is charged with knowledge that different kinds may be present.³

655. Where a brakeman was killed in an attempt to couple cars, the couplings of which were unmatched, and it appeared he had used such couplings for a long time, it was held that he was chargeable with knowledge of and therefore assumed the extra hazard, which would prevent a recovery.⁴

656. Without bumpers.—It was held that a brakeman who had been in the service eighteen months, where stock-cars were used which have no bumpers, was chargeable with

¹ Gibson v. Pacific R. Co., 46 Mo. 163.

² St. Louis, I. M. & S. R. Co. v. Higgins, 53 Ark. 458, 14 S. W. 653.

³ Thomas v. Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. 980.

⁴ Norfolk & W. R. Co. v. McDonald's Adm'r, 88 Va. 352, 13 S. E. 706.

knowledge of the fact and assumed the risk of injury from the use of such.¹

657. Coupling, kind used.— Where a brakeman who was a minor and had been in the service but a short time and had used the kind of coupling appliance which caused him injury but once, and that on the same trip, was injured in the attempt to use it, and it was charged that it was a kind more dangerous than another kind, but not that it was defective, and it appeared it was of a kind not unusual when he entered the service, it was held he could not recover. He knew of its character; he assumed the risk as one incident to his employment.²

658. It was said that in view of the frequency with which the "three-link" coupling is used on freight trains, a brakeman must be presumed to have assumed the risk attendant upon the use of this coupling as one of the ordinary risks of his employment.³

659. Absence of check-chains.— Where an employee of a railroad company knew that some of the cars were not supplied with check-chains and failed to observe whether the one on which he was riding was so provided or not, it was held that he could not be heard to complain that the injury was caused by the absence of, or might have been prevented by the use of, such a device. This risk he assumed.⁴

659a. Hand-hold, absence of.— Where the neglect of duty charged was the absence of a hand-hold upon a car, and it appeared that the brakeman, who was injured by falling from the deadwood of the car, had approached it from the tender to which it was attached, and could have seen the absence of the hand-hold had he looked, it was held proper to charge that he had the opportunity, and if he

¹ *Houston & T. C. R. Co. v. Bar-rager* (Tex.), 14 S. W. 242.

² *Hatter v. Illinois Cent. R. Co.*, 69 Miss. 642, 13 So. 827.

³ *Darracott v. Chesapeake & O. R. Co.*, 83 Va. 288, 2 S. E. 511.

⁴ *Ladd v. New Bedford R. Co.*, 119 Mass. 412.

failed to observe the absence of the hand-hold it was his fault.¹

660. Slippery condition of platforms.— It was held that the slippery condition of platforms to cars was a risk assumed, for that was a defect which was perfectly obvious to the senses.²

661. Defect in roof.— Where a brakeman was injured by the hand-hold of a car pulling out because the roof was rotten, and the court was asked to charge, in effect, if the plaintiff did not know that the roof of the particular car was rotten, but had knowledge that there were a number of cars in use in such condition and knew he was liable to injury from such cause, that he would be chargeable with an assumption of the risk, which request was refused, it was held that such refusal was not error. It was said: Though plaintiff was aware that some of the roofs of the defendant's cars were rotten, but he had never noticed any hand-holds loose, it did not appear that the cars were so uniformly rotten as to establish a condition which plaintiff was bound to notice. *Railway Co. v. Somers*, 71 Tex. 700, distinguished, on the ground that there the cattle-guards were permanent structures.³

662. Carriage in a charcoal factory.— Where an employee was injured by reason of the wheel of a carriage which was somewhat worn, used in a charcoal factory, jumping the track, and the track was uneven, the defect in each of the appliances being obvious and entirely exposed to view, and it appeared that such employee knew the carriage had once before left the track at the same place, causing an accident, it was held that the danger was so apparent from the defect that there was no question for the jury as to plaintiff's knowledge of it. He assumed the risk.⁴

663. Grindstones, method of trimming.— Where an employee had worked in a machine-shop for a year, and had

¹ *Dooner v. Delaware & H. Canal Co.*, 171 Pa. St. 581.

² *Adkins v. Atlanta, etc. R. Co.*, 27 S. C. 71.

³ *Fordyce et al. v. Culver*, 2 Tex. Civ. App. 569, 22 S. W. 237.

⁴ *Yates v. McCullough Iron Co.*, 69 Md. 370.

seen grindstones trimmed by others, and had been shown by the foreman how to trim them, and had worked upon one himself once before the accident to him, and he was injured by reason of the iron bar which he was using to hold the stone getting caught in the stone, thus crushing his hand between the bar and the stone, it was said the danger must have been as apparent to him as to one of more experience, and therefore he was held to have assumed the risk.¹

664. Horse, vicious habits of.—The rule was stated that where a servant is injured in the course of his employment after having had a fair opportunity to become acquainted with the risks naturally and reasonably incident thereto, he will be deemed to have contracted to submit to such risks; and applied to a servant having knowledge of the vicious habits of a horse he was grooming, and where the master also had knowledge.²

665. Hand-car, too light.—Where an employee was injured by a hand-car which he was using jumping the track, and it was alleged that it was defective in that it was too light, it was held he could not recover; that the lightness of the car and the dangers, if any, arising therefrom were such as he should have known.³

666. Defective handle.—Where the alleged cause of injury to a section-man was a defect in the handle of a hand-car he was using at the time of his injury, and it appeared it broke where it entered the iron clasp or socket, and there were nail holes in it there, and there was evidence to the effect that the handle, from the character and grain of the wood, was too weak to withstand the strain put upon it, it was said: Though the plaintiff may not have been charged with the duty and responsibility of inspecting or repairing the car except as he might from time to time be directed by the foreman, yet he was undoubtedly bound to exercise care

¹ Melzer v. Peninsular Car Co., 76 Mich. 94, 42 N. W. 1078.

³ Gulf, C. & S. F. R. Co. v. Williams, 72 Tex. 159, 12 S. W. 172.

² Green & Coates Pass. R. Co. v. Bresmer, 97 Pa. St. 103.

commensurate with the risks to which he was subjected in his employment; and such defects in an implement which he was frequently using as were obvious to the senses, or with reasonable diligence, considering the circumstances and nature of his employment, ought to be discovered or known by him, he must be held to take the risk of. It was held whether he was chargeable with such knowledge was properly a question for the jury.

Two of the justices dissented.¹

667. Defective lever.—A section-hand was thrown from a hand-car and injured by reason, as alleged, of a defective lever. The handle was made fast by a nail stuck or wedged in to hold it in place, which the employee knew, and on a former occasion he had helped thus to secure it. It was said: While a railway company is bound to furnish safe appliances and tools for the use of its employees and is liable if it fails to do so, yet this liability is not extended to cases where the defects complained of come within the ordinary risks the employee assumes when he enters the service, or when he is aware of the defect and still continues to use the machinery. The employee is not required to look for defects; but such as are patent or are known to the employee he must be held to assume the risk of, if he still handles the machinery when fully competent to judge of the danger. Judgment of nonsuit was affirmed.²

668. Hooks, attached to a crane, from being dull.—Where one employed to assist in loading heavy timbers upon a car could by looking see that the hooks attached to a crane used in the work were dull and incapable of safely holding the timbers raised by it, and he continued in the service without objection, it was held he would be deemed to have assumed the risk created by the defect.³

669. Lantern, defect in.—Where the negligence alleged was the condition of a lantern in use by a brakeman, not-

¹ Anderson v. Minn. & N. W. R. Co., 39 Minn. 523.

² Norton v. Louisville & N. R. Co. (Ky.), 30 S. W. 599.

³ Rietman v. Stolte, 120 Ind. 314.

withstanding the averment that the employee did not have knowledge of its defective condition, he was held chargeable with knowledge. It was said: No other person had better opportunities for knowledge, and it was his duty to report. The employer ordinarily could only learn through him.¹

669a. It was alleged on behalf of a brakeman injured while coupling cars that the cause of his injury was the negligence of the defendant in furnishing him an inferior quality of oil for his lantern, which impaired his ability to see clearly. It appeared that the brakeman had been using the same quality of oil in his lantern for more than two months without complaint. It was held he could not recover.²

670. Locomotive ; short draw-head.—It was said that one who accepts employment from a railroad company as a switchman in its yard assumes the risk of injuries resulting to him from a visible defect in the locomotive on which he is at work, consisting of a draw-head so short as to leave an insufficient space between the locomotive and any car to be coupled to it for the switchman to perform his work with safety.³

671. With a square tank for switching.—Where a section-man was run over by a locomotive in use in a yard, which was equipped with a square tank instead of a sloping one, it was held that an instruction in effect, that if he knew of patent defects or might have known of them in the exercise of proper care in the engine he could not recover, was improper. It was said: He is only chargeable with such as are open to observation. He could see the square tank, but the evidence fails to show that he understood the nature of the danger.⁴

672. Rope or cable ; securing derrick.—Where an employee was injured by the fall of a derrick, caused by the

¹ *Pennsylvania Co. v. Congdon*,
134 Ind. 226.

² *Huffman v. Mich. Cent. R. Co.*
(Mich.), 67 N. W. 118.

³ *Brooks v. Northern Pacific R.*
Co., 47 Fed. 687.

⁴ *Missouri Pacific R. Co. v. Lehm-*
berg, 75 Tex. 61, 12 S. W. 838.

breaking of a guy rope, and it appeared such ropes were of iron which had rusted and one of them had been broken and repaired; that the defendant had examined them and regarded them as sufficiently strong; that the plaintiff had expressed some doubts as to it, but neither believed it unsafe, and that the rope broke in a different place from where it had been repaired, it was held that the master was negligent and that the employee did not assume the risk. It was said: It is not enough for the master, in such a case, that the servant was apprehensive merely of possible danger, especially when, as here, the master himself, knowing the circumstances, did not believe the danger to exist.¹

673. Set-screws.—A machinist and engineer who knew that set-screws were in common use, although he did not have actual knowledge of the one causing him injury, though he had an opportunity of ascertaining it, was held to have assumed the risk of injury therefrom.²

674. It was said: Where a person enters the service of another he impliedly assumes all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used, and it is immaterial whether he examined the machinery before making his contract or not. He could look at it if he chose. He will be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer so far as they were open and obvious.

This was said where an employee was injured by a set-screw upon a revolving shaft.

It was further said that defendant was not bound to box his machinery nor to change the set-screw for a safer one.³

675. Steam-hammer; the effect of its use upon surrounding objects.—It was said that a workman operating an appliance is presumed to know what effect its operation is likely to have upon surrounding objects.

¹Dumas v. Stone, 65 Vt. 442, 25 Atl. 1097.

²Goodnow v. Walpole Emery Mills, 146 Mass. 261.

See other cases under INSTRUCTION and WARNING.

³Rooney v. Sewall & Day Cordage Co., 161 Mass. 153.

This rule was applied to a workman whose duties required him to use a steam-hammer, which, after being repaired and he had resumed its use, jarred a beam, which had been temporarily used while making the repairs, loose from overhead, which fell upon him.¹

676. Water-tank, defect in appliance holding the spout. Where a yard-master was injured by the fall of a spout to a water-tank, caused by some defect in the appliance which held it, and it appeared that it had been out of repair for three months prior to the accident and the defendant had knowledge of its defective condition, and it also appeared that the plaintiff had worked in the defendant's yard for three years, but there was no evidence that he had ever used the tank, it was held there was not sufficient appearing to charge the plaintiff with notice of the defect.²

3. Premises.

677. Where a brakeman, a young man of a few months' experience, was killed by contact with a low bridge, the court applied the rule as stated in *Pierce on Railroads*, page 379, as follows: A servant who, before the injury, has knowledge of the defect in the road or machinery, or who, having a reasonable opportunity to inform himself, ought to have known of such defects, is presumed, by remaining in the company's service, to have assumed the risks of such voluntary exposure of himself, and cannot recover for an injury resulting therefrom; and his knowledge has the same effect whether the company or master was informed or was ignorant of such defect. This rule applies with special force where the defect or danger is obvious to the senses. A servant who knows of the defect and perils takes the risk of dangerous implements, . . . of services of peculiar peril which he undertakes, and of dangerous practices in which he participates, of injuries resulting from the projecting roof of a structure, house, or from bridges which are too low to

¹ *Reading Iron Works v. Devine*,
109 Pa. St. 246.

² *Texas Pacific R. Co. v. Crow*, 3
Tex. App. 266, 22 S. W. 928.

allow him to ride standing upright on the top of a train; and he is ordinarily chargeable, from the fact of his entering the employment, with knowledge of the height of such bridge without notice or warning from the company.¹

678. Bridges, low.—Notwithstanding what was said in *Hooper v. Railway Co.*, 21 S. C. 541, in effect, that ordinarily a servant is chargeable with notice of low bridges from the fact of his entering the employment without warning from the company, yet at the same time, where it appeared that a brakeman was injured by contact with a low bridge, it appearing that he had been in the employ of the company for weeks, the court refused to apply the rule, simply for the reason that he testified he had no knowledge of the dangerous character of the structure and had not been warned.²

679. It was held that a brakeman, injured by contact with a low bridge under which he had passed daily for three weeks, had assumed the risk. It was said that a servant who enters upon employment from its nature hazardous assumes the usual risks and perils of the service, and of the open, visible structures known to him, had he exercised ordinary care.³

680. Where dangers are obvious, such as can be seen and known by ordinary care and prudence in the use of the senses, the master need not advise his servants of their existence and instruct them as to necessary means of avoiding them, since they equally with himself are held to know both the fact of the peril and how to avoid it. This was said in reference to a low bridge.⁴

681. Where a minor, who was a brakeman, was injured by a low overhead bridge, and it appeared he had been thus employed for three weeks; that he had passed the bridge every day during his service; that he had been repeatedly

¹ *Hooper v. Columbia, etc. R. Co.*, 21 S. C. 541.

² *Atlee v. South Carolina R. Co.*, 21 S. C. 550.

³ *Williams v. D., L. & W. R. Co.*, 116 N. Y. 628.

⁴ *Louisville & N. R. Co. v. Banks*, 104 Ala. 508, 16 So. 547; *Williamson v. Newport N. & M. V. R. Co.*, 34 W. Va. 657, 12 S. E. 824.

warned to look out for this and other bridges, it was held the risk was one assumed.¹

682. Where an injury was caused to a brakeman by contact with a low bridge, the approach to which was not guarded by a tell-tale or other device, and it appeared that the brakeman had crossed the bridge several times standing on top of box-cars, the bridge being located within the yards of a prominent station, it was held that it was a question for the jury whether he was guilty of contributory negligence in not ascertaining, by measurement or accurate observation, that he could not safely pass while standing on the running board of a furniture car.

The question of assumed risk in this case, as in many other cases in the local federal courts, seems to have been ignored.²

683. Where a servant enters upon an employment he accepts the service subject to the risks incident to it. An employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge, from causes that are open and obvious, the dangerous character of which causes he had opportunity to ascertain. If a man chooses to accept employment or continue in it with knowledge of the danger, he must abide the consequences so far as any claim against his employer is concerned. This was said where an employee was injured by contact with a low bridge.³

684. An employee must be held to have understood the ordinary hazards attending his employment, and therefore to have voluntarily taken upon himself the hazards when he entered, or where, with that knowledge, he chose to continue in the service. This was said where an employee was injured by contact with a low bridge while on top of a car.⁴

¹ Devitt v. Pacific R. Co., 50 Mo. 709; Chesapeake & O. R. Co. v. 302. See, also, Rains v. St. L., I. M. & S. R. Co., 70 Mo. 164. Hafner's Adm'r, 90 Va. 621, 19 S. E. 116.

² Northern Pacific R. Co. v. Mortenson, 63 Fed. 530 (C. C. A.). ⁴ Balt. & Ohio R. Co. v. Stricker, 51 Md. 47.

³ Clarke v. Railroad Co., 78 Va.

685. If with knowledge of increased danger a servant continues the employment, the increased danger becomes an incident of the service which he assumes, and for any injury resulting therefrom the master is not liable. By the acceptance of the service and the continuance therein, the servant assumes the hazard incident to obvious and known dangers.

This rule was applied to an employee who was killed by contact with a low bridge after he had been in the service of the defendant as brakeman for seven months, and he was held chargeable with knowledge of its dangers. It was said: Having assumed the perils of his employment in respect to the bridge, the question of contributory negligence was not in the case, for, if he was not guilty of it, he had no right of recovery.

It was also held that the want of means of warning or notifying brakeman of the approach to the bridge were risks assumed.¹

686. It was held that there is no legal obligation on the part of a railroad company to build its bridges over public roads with an elevation so great that one of its employees standing upright on top of a car will not be endangered, and consequently an employee thus injured cannot recover; such employee is chargeable from the mere fact of his entering the employment with a knowledge that this danger exists.²

687. Yet it was held by another court that the risk of injury from a low overhead bridge was not a risk incident to the service which a brakeman assumed.³

688. And stated in another case, that an employee does not assume the risk of unusual dangers, such as result from low overhead bridges, of the perilous character of which he has no knowledge or of which he is not bound to take notice.⁴

¹ Carbine's Adm'r v. Bennington & R. R. Co., 61 Vt. 348, 17 Atl. 491.

³ Pennsylvania Co. v. Sears, 136 Ind. 460.

² Baylor v. D., L. & W. R. Co., 40 N. J. L. 23.

⁴ Louisville, N. A. & C. R. Co. v. Wright, 115 Ind. 378.

689. It was held that a conductor who had passed under a bridge daily for three months was not chargeable with knowledge or an opportunity of knowledge of its dangerous character. He knew the bridge was there, but not the exact distance above the top of the car.¹

690. Narrow.—Where a fireman was killed while on the side of his engine in the act of putting out fire in some waste on the box of a driving-wheel, by contact with the sides of a bridge, it being claimed that the bridge was too narrow, it was held that it was not a breach of duty to maintain low bridges or bridges of such width that they were safe to one exercising ordinary care.²

691. Buildings, taking down.—It was said an employer does not impliedly guaranty the absolute safety of his employees. In accepting an employment the latter is assumed to have notice of all patent risks incidental thereto, or of which he is informed, or of which it is his duty to inform himself, and is further assumed to undertake to run such risks.

This rule was applied to a laborer who was injured by the fall of a building caused by the removal of tackle supporting it, where it was claimed such tackle was removed without his knowledge. It was said that, as he clearly could have seen it was removed, he was chargeable with knowledge.³

692. It was said that to maintain an action against the master for an injury resulting from defective buildings, premises or appliances two elements must concur, viz.: fault or knowledge on the part of the master, innocence of fault or ignorance of the danger on the part of the servant. However gross the fault of the master in subjecting the servant to risk from such causes, yet when the servant knows the

¹St. Louis, Ft. S. & W. R. Co. v. Irwin, 37 Kan. 701, 16 Pac. 146. For other cases, see 477, 558 et seq.

²Sheeler's Adm'x v. C. & O. R. Co., 81 Va. 188; Illick v. Railway Co., 67 Mich. 632. ³Sykes v. Packer, 99 Pa. St. 465.

defects and danger, and still knowingly and without protest consents to incur the risks to which he is exposed thereby, he is deemed to assume such risks and to waive any claim for damages against the master for injuries resulting therefrom.

This was said and the rule applied where an employee, engaged with others in taking down the exposition building at New Orleans, was injured by the fall of trusses. It was further said: The evidence conclusively establishes that the weakening of the supports of the trusses and the danger of their falling at any moment were apparent and known to every one engaged in the work.

The case of *Farrow v. Sellers*, 39 La. Ann. 1011 (3 So. 363), was distinguished. The defect there was latent, and the particular danger was not anticipated by any one.¹

693. Uneven floor.—An employee in defendant's freight-house was injured while engaged in moving a large, heavy stone, and he alleged that his injuries were due to the unevenness of the floor, the lack of sufficient number of men to handle it, and the lack of a foreman of experience. It appeared he had been working in handling freight for the defendant for a number of years. It was held he was chargeable with a knowledge of the dangers and assumed the risks, and the law applicable to the case was thus declared: "In performing the duties of his place a servant is bound to take notice of the ordinary operation of familiar laws of gravitation and to govern himself accordingly. If he fails to do so the risk is his own. If the instrumentalities furnished by the master for the performance of the servant's duties are defective, and the servant is aware of this, though not aware of the degree of defectiveness, he is bound to use his eyes to see that which is open and apparent to any person using his eyes, and if he fails to do so he cannot charge the consequences upon the master."²

694. Machinery, working near in dimly-lighted room. Unless an employee, injured by dangerous machinery, knew

¹ *Carey v. Sellers et al.*, 41 La. Ann. 501, 6 So. 813; *Pollich v. Sellers et al.*, 42 La. Ann. 623, 7 So. 786.

² *Walsh v. St. Paul & Duluth R. Co.*, 27 Minn. 367.

or ought to have known of the danger to which he was exposed in working near it, he cannot be said to have recklessly exposed himself to danger or to have voluntarily assumed the risk attendant thereon.

This was said where an employee was called upon to assist in taking apart some rollers upon a platform in a room dimly lighted, where there was dangerous machinery, belts and appliances of which he had no knowledge, never having worked there before, and he was injured by contact with such appliance.¹

695. Mills, saws extending into passage-way.—Where an employee was injured by contact with a saw which extended into a narrow passage-way, it was held that he must have known of its location and attending danger, and he assumed the risk by continuing in the employment. It was said: When the plaintiff entered upon his employment the fact that the saw was not covered, and that it projected over its frame partly across the narrow passage-way along which he was obliged to go in tightening and loosening the belt, were all presumed within his knowledge. The condition of the passage-way and the relation of the saw to it, if unsafe and dangerous, would be seen and comprehended at a glance by a person of common intelligence.²

696. Defective automatic appliance in.—Where a sawyer was injured by the breaking of a rope which automatically, with the aid of a pulley and weight, held the saw in a frame, and it appeared he had worked in connection with it for several months, and he testified he did not know the condition of the rope, never having looked at it, it was held the risk was assumed.³

697. Defective pipe; escape of steam.—An employee, accustomed to the work of edgerman in a saw-mill, was injured by a board riding the saw and, being thrown with

¹Gisson v. Schwabacher, 99 Cal. 419.

³Schulz v. Johnson, 7 Wash. 403, 35 Pac. 130.

²Stephenson v. Duncan, 73 Wis. 404.

great force backwards, striking him. He had charge of the machine, and his duty seems to have been to watch and observe it, and see whether it was doing its work properly. It was alleged that there was a leak in the exhaust pipe which filled the mill with steam, rendering it difficult to see to do the work, and that the danger was increased by the condensation and freezing of the steam upon the rollers and machinery, making them slippery; also that the band or guard placed upon the saws on the edger to prevent boards from being thrown back were improperly located. It was held that, as these things were open and obvious to the employee, he assumed the risk of the consequent danger and injury.

The evidence showed that it was a rare occurrence that a board rides the saw, and it was claimed that fault ought not to be imputed to the plaintiff for that reason. The reply was: If not to the plaintiff, why to the defendant? The rule was stated and applied that such an employee assumes not only the ordinary risks incident to his employment, but additional risks from defects in a machine, or elements of danger not usual or incident to his employment, which he either knew or ought reasonably to have known and appreciated.¹

698. Defective ladder in.—Where an employee in a saw-mill who had been engaged for a month in firing was told by the watchman to take a broom and hurry up a ladder and sweep off sawdust on the top of the boiler which had become ignited, and he fell and was injured, and it appeared the ladder consisted of strips of wood nailed to wooden posts which extended eighteen inches above the brick work; that the ladder was used frequently, and it was obvious that the post was short, and it was evident that the defendant had every reason to believe that this was known to the plaintiff, though the plaintiff testified that he thought the posts extended further up; that he could not see, but knew he had reached the last slat, it was held that knowledge

¹ Peterson, Adm'x, v. The Sherry Lumber Co., 90 Wis. 83.

of the defect and danger was chargeable to the plaintiff. It was said: In places like saw-mills, appliances more or less crude may reasonably be expected, and those who use them are ordinarily as good judges of their safety as the master. If unsafe, and the employee still consents to use them, the risk is his, and the master has a right to expect that he assumes them, when the nature of the appliance and its dangers are obvious.¹

699. Mine, defects in.— It was said that before a miner can be held to have waived defects in the construction of a mine in which he is employed, by continuing to work therein, he must have had a reasonable time to become acquainted with their bearing upon the hazards of his employment.²

699a. An employee was injured while going through an entry to a room of a mine by falling slate. It appeared that the roof was dangerous on account of a layer of draw slate which was liable to fall at any time, and yet it might not have fallen for years. The mine boss had notice of its condition, but no steps were taken to remove the slate or protect it from falling.

Without determining as a matter of law that the risk of danger from this source was assumed, it was said that the servant did assume all such risks as, from the nature of the business as usually and ordinarily conducted, he must have known when he embarked in the service, and also those risks which the exercise of his opportunities for inspection, while giving diligent attention to such service, would have disclosed to him. The court quotes approvingly the rule stated in *Bailey's Master's Liability*, page 162, viz.: He must use reasonable care in examining his surroundings, to observe and take such knowledge of dangers as can be obtained by observation. In performing the duties of his place he is bound to take notice of the operation of familiar natural laws and to govern himself accordingly. If he fails to do

¹ *La Motte v. Boyce* (Mich.), 63 N. W. 517.

² *Crabell v. Wapello Coal Co.*, 68 Iowa, 751.

so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes; and if the defect is obvious and suggestive of danger, knowledge on the part of the servant will be presumed as well as when the dangers are the subject of common knowledge.¹

700. Where an employee in a mine was injured by a cage which worked noiselessly coming down upon him while he was at the bottom of the shaft, and the neglect of duty charged was the failure to have a roadway around the shaft and to have the signal-bell line extended to the level where he was working, it was said the sole question was whether the deceased by continuing in the employment assumed the risk incident to these conditions; and as the rule is unquestioned that a servant is to be held ordinarily to assume such risks and such dangers as are incident to the business, in the place and with the means in and with which he is required to do the work, provided he knows such risks, and that he is held to know such as are manifest to one of ordinary common sense and observation, or which by the prudent exercise of the senses and common sense may be perceived and appreciated, the question is narrowed down to this: Were the risks which the deceased incurred, the dangers to which he was exposed and by which he was finally killed, manifest to one of common sense and observation, and could they be ascertained by a prudent exercise of the senses? Of course, where to ascertain and appreciate danger expert knowledge is required and the servant possesses it, he is bound to exercise that as well as his senses. In this case there is no question of expert knowledge or skill; any one of common sense would know that if the cage should come down upon him while crossing the shaft, it would injure him. Any one would know that a call to the level above might not be heard or understood.²

¹Linton Coal & Mining Co. v. Persons (Ind.), 43 N. E. 651.

²Quick v. Minnesota Iron Co., 47 Minn. 361, 50 N. W. 244.

701. Where a person not skilled in timbering mines was employed as a trammer in and about a mine for a considerable period before he was injured by the falling of a defective roof, it was held that his means of knowledge concerning the condition of the roof was simply a matter for the consideration of the jury. The doctrine of contributory negligence was applied.¹

702. It was held that an experienced miner employed to timber a place in a mine, who was injured by means of a shattered roof, though employed to perform a hazardous duty, nevertheless did not assume the extra hazard of defects as to which he was not informed, it appearing he had not been in the place before.²

703. Platform; hole in planking.—Where an employee was injured by his foot being caught in a hole or space left between planking which was three and one-half inches wide, in plain sight, and it appeared that such employee had worked for a time in the yard and close to this space, though he testified he did not know of its existence, it was held that he assumed the risk, and that no duty rested upon the employer to change the planking.

The court distinguished this case from *Hannah v. Conn. River R. Co.*, 154 Mass. 529, in this: that in that case there was a temporary hole in the road, formed after the plaintiff's employment began and he had been there but a short time, while here it existed at the time of the employment.³

704. Switch, close to tracks.—It was said that a railroad yard where trains are made up necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad company connected with the making up or moving of trains assumes the risk of that condition of things.

This was said where a brakeman was injured by being

¹Sampson Min. & Mill Co. v. Schaad, 15 Colo. 197, 25 Pac. 89. ³Gleason v. N. Y. etc. R. Co., 159 Mass. 68.

²Trihay v. Brooklyn Lead Min. Co., 4 Utah, 468, 11 Pac. 612.

struck by an engine while operating a ground switch, the lock of which was placed between two tracks which were about six feet apart.

It was further said: Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent track.¹

705. Absence of lock.—Where a conductor had been in the employ of the defendant for a year prior to receiving his injury, alleged to have been caused by the failure to provide a lock or fastening to a switch, during which time it had remained in that condition, it was said that section 2590 of the code, providing that the employer is not liable if the employee knew of the defect causing the injury and failed within a reasonable time to give information thereof to his superior, unless he was aware the employer or superior already knew of such defect, does not change the doctrine of *volenti non fit injuria*; overruling as to the latter proposition *Railway Co. v. Holborn*, 84 Ala. 133, and *Railroad Co. v. Walters*, 91 Ala. 435.²

706. Track, curves; street railway.—One employed about a car-house by a street railway company was held to the presumption of knowing the danger from cars passing each other on a curve in the track leading from the car-house. It was said that it was immaterial that the risk had been increased during his employment by the use of larger cars so long as he continued to work without protest or promise of change of condition.³

707. Unfinished.—An employee at work upon a construction train, employed in delivering ties upon an unfinished track, was held to have assumed the risk of injury from that source, the perilous condition of the road being equally obvious to the servant and master.⁴

¹ *Randall v. Baltimore & Ohio R. Co.*, 109 U. S. 478.

³ *Goldthwait v. H. & G. S. R. Co.*, 160 Mass. 554.

² *Birmingham Ry. & Electric Co. v. Allen*, 99 Ala. 359, 13 So. 8.

⁴ *Evansville, etc. R. Co. v. Henderson*, 134 Ind. 636.

708. A brakeman who enters the employment of a railroad company to work on a construction train, and who can see that the road is not finished, and that trees border it on either side, assumes the risk of being struck by a tree growing close to the track and in plain view. It was said: As a general rule it is the duty of a railroad company to furnish its employees a safe place to work while operating its train, yet the rule must be considered with some qualifications when the road is being built. The employee cannot complain of the imperfect condition of a road he is employed to assist in making perfect. He must take the risk naturally incident to such employment. He assumes greater risks upon such a road than upon a completed one, where he might expect that the track was clear and all obstructions removed.¹

709. Defects in.—It was said: It cannot be affirmed, as matter of law, that an engineer, while running his engine upon a railroad, has the same opportunity as the corporation, or whatever subordinate may represent it, whose duty it is to keep the track in repair, to ascertain and know of defects, and in case of injury to him in consequence of such defects he cannot be deemed guilty of contributory negligence simply because he knew the track was somewhat out of repair. It seems, however, if the engineer knew that the track was so badly out of repair that it was dangerous to run over it, then, by continuing in the employment after such knowledge, he assumed the risk, and the corporation would not be held liable for an injury.²

710. Where it was alleged and claimed that the cause of the death of a conductor was a defective track, and it appeared that he had been running over it for a considerable length of time, it was said: We cannot presume, in the face of the allegation that the employee did not know of the de-

¹ Manning v. C. & W. M. R. Co. (Mich.), 63 N. W. 312. See, *contra*, R. Co., 73 N. Y. 585.
² Mehan, Adm'x, v. S. B. & N. Y. Gulf, C. & S. F. R. Co. v. Redeker, 67 Tex. 181, 2 S. W. 513.

fects, that he had been so long employed in running over the defective track as to become familiar with it; nor can we know that a conductor whose trains pass rapidly from station to station, and whose duties are in the operation of trains, and not in track construction or repair, has a reasonable opportunity of seeing that ties are broken, or that they have decayed, or that ballast has not been sufficiently placed or may be displaced.¹

711. Where a fireman was injured by the overturning of an engine caused by the defective condition of the track, and he had been passing over the track, for a considerable length of time, twice a day, and had observed the track was rough and rails short, and that his apprehensions were thus aroused, yet he made no particular inspection of the track and was not aware of the particular defect causing the accident, viz., a defective joint, it was held that, as he had no opportunity for special examination and the company had, and the duty to maintain the track in a reasonably safe condition was that of the company, he properly confided in the defendant that it would discharge its duty, and therefore his continuance in the service was not a consent to assume the risk of a defective track.²

712. Where, however, a section-man, whose duty was in connection with keeping the track in repair, was injured while riding upon a load of ties being conveyed upon such track, by reason of defects in such track, it was held that he was chargeable with knowledge and therefore assumed the risk.³

713. It was held that an employee of a railroad company, whose duties were to paint bridges and structures, using for such purposes a steam hand-car to convey him from place to place, who was injured, alleging as the cause the worn condition of the wheels of the car and the unevenness of the

¹ Louisville, E. & St. L. C. R. Co. v. Miller, 140 Ind. 685, 40 N. E. 116. ³ Mitchell v. Fullington, 83 Ga. 301, 9 S. E. 1083.

² Dale v. St. L., K. C. & N. R. Co., 63 Mo. 455.

rails forming the track, assumed the risk of injury from such causes; that the defects were of such an obvious character that he must be presumed to have known of them.¹

714. Washout.—Where a fireman was injured by reason of a washout of a portion of the track caused by a heavy rain, and the question was as to his assumption of the risk, it was said: The fact that he may have had notice of the rain would not charge him with contributory negligence, unless he also had notice of the condition of the track, which the rain rendered dangerous. We are not prepared to hold that every time it rains the employees in charge of a railroad train must be expected to quit their posts and stop the train or be held to have assumed all injuries that may result, unless they have notice of the defect which makes the rain dangerous.

The defect in the track referred to was that the fill where the accident occurred was composed of loose sand or earth, through which the accumulated water broke.²

715. Hole under tie.—Where a brakeman while engaged in coupling cars at night stepped into a hole under a tie and was injured, the defect not being patent, but required inspection to discover, and it appeared he had never worked on that portion of the track before, but his attention had been called before to the generally unsafe and dangerous condition of the track, and that the attention of the track repairers had been called more than once to the dangerous condition of this part of the track, but no steps had been taken to repair it, it was held that it could not be said as matter of law that he had assumed the risk. It was said: In case of a patent defect, or such as the servant, if reasonably observant, would have discovered by his ordinary use of the machinery or appliance, his opportunity to know would be held as knowledge, whether in fact he knew of the defect or not. It is not incumbent upon the servant to search

¹ *McQueen v. C. B. & U. P. R. Co.*, Wilson, 3 Tex. App. 583, 24 S. W. 30 Kan. 689.

686.

² *Fort Worth & D. C. R. Co. v.*

for latent defects, but he has without any investigation the right to assume that appliances are safe and sufficient for the purpose they are used.¹

716. Drain or ditch near track.—The general rule was stated that a servant who remains in the service knowing of a defect in the machinery used by him, without giving notice thereof, assumes the risk of injury therefrom; and a servant will be presumed to know of defects which are obvious and open to observation, and applied where a brakeman was injured while attempting to mount a car after coupling it, by reason of the existence of a ditch near the track.²

717. Side-track, hole in.—It was first said it could not be held as matter of law that a brakeman injured by stepping into a hole in a side-track while uncoupling cars assumed the risk, in the absence of proof of how long he had been in the defendant's employ, or that he had seen the track before the injury.³

718. Upon a second appeal it was said the plaintiff had no right to rely upon the track being smooth. He must look before he acts, though he never saw the road before.⁴

719. Worn rail.—Where a switchman, while standing on the foot-board of a tender, was thrown off by a sudden jerk caused by a worn rail in the side-track, left there by the track employees, he not having a secure hold of the rail upon the tender at the time, it was held that, as he had full means of knowing of the condition of the track and the custom of the road as to using worn rails for side-tracks, that the risk therefrom was one assumed.⁵

720. Where an employee was injured by his foot getting caught by a splinter of a worn rail used in a side-track, it was said, upon the question of the assumption of the risk by him, if he knew, or by the use of ordinary observation

¹Porter v. H. & St. J. R. Co., 71 Mo. 66.

²Davidson v. Southern Pacific R. Co., 44 Fed. 476.

For other cases see PREMISES.

³Ragon v. Toledo, A. A. & N. M. R. Co., 91 Mich. 379.

⁴Ragon v. Toledo, A. A. & N. M. R. Co., 97 Mich. 265, 56 N. W. 612.

⁵Mich. Cent. R. Co. v. Austin, 40 Mich. 247.

and care ought to have known, that the defendant's side-track at this station was composed of rails so worn and splintered as to be dangerous, he would be deemed to have assumed the risk incident thereto, if he also knew and appreciated (or ought to have done so) the nature and extent of the danger.¹

721. Where an employee of a railroad company was injured while riding on a construction train, caused, as was alleged, by the defective condition of a side-track, it was said: If plaintiff knew the manner in which the side-track was constructed, he assumed the risk necessarily incident to such construction. In riding on this train he consented to and accepted the incidents usual to such a train. He cannot recover for injuries resulting from the condition of the side-track, if the same was constructed in the usual way, though the grade was imperfect or uneven and the track unballasted. But if, through failure to spike the rails or neglect to keep it in suitable repair for the temporary purposes for which it was constructed and used, an injury occurred to one lawfully on the train, without fault on his part, he would be entitled to recover.

The defect complained of by the plaintiff arose chiefly from the fact that the rails were not properly spiked to the ties.²

722. Condition of new track.—Where an employee had passed over a side-track, on several occasions; which was new, rough and uneven, he was held to have had an opportunity to know its condition and was chargeable with its risks.³

723. Obstructions; material at side.—Where a brakeman was injured by stepping upon a small spiral spring embedded in the grass near a repair track, it was held the danger from such cause was incident to his employment and a risk assumed. He was presumed to know that pieces of

¹Doyle v. St. Paul, M. & M. R. Co., 42 Minn. 79.

³O'Neal v. Chicago, etc. R. Co., 132 Ind. 110. See Railway Co. v. Corps, 124 Ind. 427; Railway Co. v.

²Rosenbaum v. St. Paul & Duluth R. Co., 38 Minn. 173, 36 N. W. 447.

Buck, 116 Ind. 566.

wood and iron were liable to fall to the ground and escape the attention of inspectors.¹

724. Arm of derrick extending over.—Where a brakeman was injured by contact with a hook attached to the arm of a derrick erected close to the track, which arm not being properly secured swung across the track, it was held that defendant's negligence appeared; that its duty was to place the derrick under control of a competent person and to see that it was properly used, and when not in use properly secured.²

725. Logs at side.—Where a section-man was injured by an engine in the defendant's yard moving upon him, and it appeared that in the attempt to get out of its way he stumbled upon some logs lying by the side of the track, the alleged negligence being that of having the track so obstructed, it was held that though such was negligence on the part of the defendant, yet the plaintiff must have known of it, and the danger incident to it was as obvious to one man of common sense as to another; therefore it was a risk assumed.³

726. Loose blocks of firewood at side.—Where a brakeman in running along the track in the performance of his duties in coupling cars stumbled upon a block of wood lying at the side of the track and was thrown beneath the cars and injured, and it appeared that he had a general knowledge of the neglect of the company to keep its track clear about its wood yards, it was said that such knowledge did not conclusively show that he assumed all the risks arising therefrom, especially if he did know of the obstructions on the track at the place where he was injured, and it is a question for the jury in such a case whether he was guilty of negligence in remaining in the employ of the company.⁴

¹ Williams v. St. L. & S. F. R. Co., 119 Mo. 316.

³ Bengston v. C., St. P., M. & O. R. Co., 47 Minn. 486, 50 N. W. 531.

² Gates v. C., M. & St. P. R. Co., 2 S. Dak. 432, 50 N. W. 908; Same Case, 57 N. W. 200.

⁴ Hulehan v. Green Bay, W. & St. P. R. Co., 68 Wis. 520.

727. Rock in bank at side.—Where an engineer was injured by reason of a large rock sliding upon the track where it ran along the mountain side, after a heavy storm, and one question was as to the assumption of the risk from such cause, it appearing that he had been for a long time in the defendant's employ, and had passed over this portion of the track every day or two during that time, it was left to the jury to determine whether he had opportunity to know, or by the exercise of reasonable care could have known, of the condition of the track and the danger.¹

728. It was said that masses of rock which have been loosened by blasting when the road was cut along the mountain side, and which were likely to fall upon the track, were not risks assumed by train operatives, unless they have actual knowledge of the conditions that create the danger, where it appears that when on the train they are on a level with the rock, which does not look dangerous from that point.²

729. Where a brakeman was injured by contact with a rock projecting from the side of a cut, while he was ascending a ladder upon a car, it was said: Where it is customary for brakemen in the performance of their duties to ascend and descend from the top of the cars by side ladders while the train is in motion, the company is bound to maintain its roadway free from projections which endanger them while so doing. It was further said: Trainmen, having no functions to perform in respect to the construction and maintenance of the roadway, have a right to assume its adaptation and sufficiency in all respects to a safe discharge of their duties in another and distinct branch of the general service, and are not held to a knowledge, which has never in point of fact been imparted to them, of defects and dangerous conditions in culverts, bridges, tracks, embankments, road-beds, cuts and tunnels of the railway company, or of the danger-

¹Little Rock & Ft. S. R. Co. v. Voss (Ark.), 18 S. W. 172.

²Bean v. Western N. C. R. Co., 107 N. C. 731, 12 S. E. 600.

ous nature of adjacent structures erected or permitted by the company.¹

730. Stake at the side.—Where an employee was injured while riding on the side of a flat-car by contact with a stake negligently left near the track, of the existence of which he had no knowledge, it was held that the danger from such cause was not a risk assumed; that an employee is not required to direct his attention to the discovery of dangers caused by alleged impediments and obstructions in the way required in the use of the road or in the line of the servant's employment.²

731. Stone-pile at the side.—It was held that a person employed as a brakeman on a section of four miles of road, and notified that there were stone-piles beside the road and so near to it that a person on the side of a car passing them would be struck, is to be deemed to have assumed the risk from that cause, although the precise location of the danger was not stated to him. The rule re-affirmed that in general the servant assumes not only the risks ordinarily incident to his occupation, but such extraordinary risks as he may knowingly and voluntarily encounter.³

732. Timber at the side of.—A brakeman while running to close a switch on a foggy morning was injured by falling over a timber lying close to the track and which was not there when he was last over the road. It was said: An employee does not assume the risk of dangers arising from an obstruction on the side of the track which renders more hazardous the performance of his duties. It is as much the duty of the company to keep its track free from obstructions as it is to furnish safe appliances, and this duty cannot be delegated to servants so as to relieve the company from liability.⁴

¹ Georgia Pac. R. Co. v. Davis, 92 Ala. 300, 9 So. 252.

² Arbello v. San Antonio & A. P. R. Co. (Tex.), 11 S. W. 913. See, also, Railway Co. v. Oram, 49 Tex. 345.

³ Smith v. Winona & St. P. R. Co., 42 Minn. 87.

⁴ Southern Pac. R. Co. v. Markey (Tex.), 19 S. W. 392. See, also, Railway Co. v. Keenan, 78 Tex. 294, 14 S. W. 668.

733. Wood-pile at the side.—Where an employee was injured by a stick of wood falling from the car, and, striking a pile of wood at the side of the track, rebounded, striking him, and it appeared the wood was not piled so near as to strike the car or plaintiff upon it, and that the plaintiff assisted in piling the same, it was said that the question of the plaintiff's negligence should have been distinctly presented to the jury.¹

734. Overhanging brush.—It was said that it could not be held as matter of law that an employee assumed the risk from brush overhanging a spur track. The cases in the supreme court which held that a servant was chargeable with knowledge and an assumption of the risk of cars with double deadwoods, of tracks having unblocked frogs, and of the sharpness of curves in a track, involved conditions of construction, while brush beside the track is not a fixed condition, but a changeable one.²

735. Structures near.—Where a conductor of a freight train, while upon his train, was struck and killed by the projecting roof of a depot building, and it appeared he had lived many years at the place where the accident occurred, and had for a long time been familiar with the road, passing over it daily, and it not appearing that any change had been made in the building or the road after he entered upon his employment, it was held that, as the particular character of the roof and its near approach to passing cars was as patent to the deceased as it was to the defendant's officers or agents, he assumed the risk when he entered upon the employment and the defendant was not liable. It was said: Where a servant enters upon employment from its nature necessarily hazardous, he assumes the usual risks and perils, and also those risks which are apparent to ordinary observation.³

736. Where an employee, an operative upon a train, who had worked on the same division for at least two years, was

¹ Meredith v. Cranberry Iron & Coal Co., 99 N. C. 576, 5 S. W. 659. For other cases, see 599 et seq.; PREMISES, 2968 et seq.

² Oregon Short Line & U. N. R. Co. v. Tracy, 66 Fed. 931. ³ Gibson, Adm'x, v. Erie Railway Co., 63 N. Y. 450.

injured by contact with a projecting awning upon a permanent structure which had existed all the time of his employment, it was held that the risk was one assumed; and it appearing that when injured he was upon a car of unusual height, but which was of a similar pattern to those occasionally hauled, it was also held that the risk of injury from the use of such a car was also one assumed; that it was not negligence on the part of the company to haul such a car.¹

737. A brakeman was injured by contact with an awning projecting from a building to within a few inches of the track. It was held, under the circumstances of the case, that such employee had not assumed the risk.

While admitting the general rule, it was stated that it cannot be said that a brakeman engaged in the service of a railroad company must know whether or not there may be one among many structures upon the line of the road whose roof or awning so projects over the line of the road that a brakeman upon a freight train, in the performance of his duties, would be likely to be swept from the train in collision with it. Knowledge on the part of such a brakeman would not be presumed where it appeared he had only been on the road two months, and with the exception of two trips had passed the structure in the night time.²

738. Where an employee was injured by contact with the awning of an elevator which projected over a side-track, it was said the employer had no right to subject him to unnecessary peril without his consent; but it is well settled in the courts of this country and England that if a servant chooses to enter an employment involving dangers of personal injury, which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed. If a person accepts service with a knowledge of the position of struct-

¹Fisk v. Fitchburg R. Co., 158 Mass. 238.

²Illinois Central R. Co. v. Welch, 52 Ill. 183.

ures from which he has occasion to be apprehensive of injury, he cannot require the master to make changes so as to obviate the danger, or hold him liable for damages in case of injury.¹

739. It was held that a brakeman, who had been in the employ of the defendant for months at the place of receiving his injury, and was familiar with the situation, must have known of the existence of a post located near the track, and therefore assumed the risk of contact with it while performing his duties upon moving cars.²

740. Where an engineer was injured by his head coming in contact with a signal-post located near the track, while leaning out of the cab window watching for signals, it was held that an action could not be maintained against the company, as it was a risk assumed. It was said: The abutments of forty-six bridges, numerous buildings, entrances to stations, and other structures on the line of the road, were the same distance from the track. These facts were known to the plaintiff, although he testified he had not, previous to his injury, noticed this particular post. As between the plaintiff and the defendant, it was immaterial whether it would have been prudent to have placed all the structures a greater distance from the track. If there was any danger to the plaintiff while in the performance of his duty, it was a risk assumed.³

741. Where a locomotive engineer was injured by contact with a post erected about a week prior, as a temporary support to a bridge, within four feet from the track and two feet from the tender beam where he was at the time, it was held that the risk was one assumed. It appeared he had passed it daily, but did not know it was there. That many other permanent structures were as close or closer than this post, as he knew. The only thing of which he was ignorant, said the court, was this particular post.⁴

¹Clark, Adm'x, v. St. Paul & Sioux City R. Co., 28 Minn. 128. ³Lovejoy v. Boston & Lowell R. Co., 125 Mass. 79.

²Pennington v. Detroit, G. H. & M. R. Co., 90 Mich. 505, 51 N. W. 634. ⁴Thain v. Old Colony R. Co., 161 Mass. 353.

742. Where a brakeman was injured while climbing the side ladder of a car, by contact with a post near the track, which was one of many similar structures equally near the track, and which he had passed every day in the course of his two years' employment, it was held that he must be deemed to have assumed the risk, whether or not he actually knew of the danger.¹

743. A brakeman was injured by contact with a signal-post as he was in the act of climbing the ladder upon a car, during his first trip over the road. It was held that it would not be assumed as matter of law that he assumed the risk. The distinction was made between this case and *Lovejoy v. Railway Co.*, 125 Mass. 79, that in the latter the circumstances were such that knowledge would be charged to the servant of the existence of such a post from his familiarity with the manner in which the structures were generally located with reference to the track, while in the former there was no such familiarity, and knowledge ought not to be presumed. It was said: The fact that it (the danger) was incident to the employment is not sufficient. Peril from dangerous machinery or appliances or structures is incident to employment upon them, but the risk is not assumed by the employee unless he knows the danger, or unless it is so obviously incident that he will be presumed to know it.²

744. The maintenance of a clearance post between the main track and a side-track, to indicate the point beyond which cars should not be placed on the side-track in order to clear trains passing on the main track, was held not to be negligence where an employee, a brakeman, was thrown down by coming in contact with such post while alighting from the cars for the purpose of operating a switch. The brakeman knew that clearance posts were used along defendant's road, and he knew for what purpose they were used. He should have anticipated the existence of a post at the place of the accident. That was the very place it was to be looked for. Whatever of danger was incident to

¹Austin v. Boston & Maine R. Co., 164 Mass. 282, 41 N. E. 288.

²Scanlon v. Boston & Albany R. Co., 147 Mass. 484.

the existence of that post at that place was one of the ordinary hazards of his employment.¹

745. Where a brakeman was injured by contact with a telegraph pole placed dangerously near the track, while he was in the act of descending from a car, it was held that he was not chargeable with an assumption of the risk or with contributory negligence, as there was no evidence that he knew anything of the pole, and his eyes, it may be supposed, were directed to the side of the car while he was in the act of getting down.²

746. Where an engineer, in leaning out of the window of his cab, came in contact with a telegraph pole located from twelve to eighteen inches from the track, and such generally was the location of such structures, and it appeared such engineer had been thus employed for about eight days, and on the day of the accident he was told to keep his head inside or he would get hurt, it was held his own recklessness was the cause of his injury, and recovery could not be had.³

747. Where a section-hand while riding on the train was injured by contact with a switch-target maintained close to the track, upon the question of his knowledge and assumption of the risk it was said: Nor can we say that plaintiff, in the ordinary exercise of his faculties, was bound to know the condition of the switch-stand. It is true that he had passed it every day for two weeks, but he had no duty to perform in connection with the running of the train, nothing that in any manner would be likely to call his attention to the condition of the switch-stand. Under such circumstances it would be but natural that he should pass it without notice.⁴

748. Where a switchman, on the second or third day of his entry in the service, while riding on the ladder of a box-car, was pushed off by an upright switch located about twenty-one inches from the ladder, but equally distant from

¹ Scidmore v. M., L. S. & W. R. Co., 89 Wis. 188.

² Chicago & Iowa R. Co. v. Russell, 91 Ill. 298.

³ Helfrich v. Ogden City R. Co., 7 Utah, 186, 26 Pac. 295.

⁴ Boss v. Northern Pac. R. Co., 2 N. Dak. 128, 49 N. W. 655.

two tracks, it was held that as the evidence was conflicting as to whether he knew of the location of the switch or could have known it by reasonable care, the question of his right to recover was properly for the jury.¹

749. Where a brakeman, in attempting to let off a defective brake, was struck by a cattle-guard, which, like all the guards along the line of the road, was dangerously near the track, and it appeared he was not a new or inexperienced employee, but on the contrary knew the defective character of the brake and that many of the guards were so near as to be dangerous, though he did not know as to the one in question, it was held that such dangers were a risk assumed by him.²

750. It was held that an experienced brakeman, who had been in the employ of a railroad company, was chargeable with knowledge of the location of wing fences to cattle-guards, with reference to their proximity to the track and of the dangers ordinarily incident therefrom. It was said that a person engaged in a particular employment will be presumed to have that knowledge of the dangers incident to his employment which he could have acquired by ordinary diligence.³

751. Where an experienced employee was killed by contact with a shed, located close to a side-track in the defendant's yard, where he had been at work for a month or six weeks, and where during that time cars were shipped in on that side-track once or twice a day, although it did not appear from the evidence that plaintiff had assisted as to that particular track (yet such must have been the fact, as he was one of the switching crew of four), it was held that under the circumstances of the case it could not be said that he

¹ Bonner v. La None, 80 Tex. 117, 15 S. W. 803. See Johnston v. Oregon, S. L. & U. N. R. Co., 23 Oreg. 94, 31 Pac. 283. ² 71 Tex. 700, 9 S. W. 741; Same Case, 78 Tex. 439, 14 S. W. 779.
³ McKee v. C., R. I. & P. R. Co., 88 Iowa, 616.

² Missouri Pac. R. Co. v. Somers,

assumed the risk. The court attempts to distinguish this case from *Illick v. Railway Co.*, 67 Mich. 632.¹

752. Where a switchman was upon the platform of a car which was being switched on a side-track, and, as he leaned outward from the steps to avoid water which was dripping from a steam-pipe at the end of the car, was injured by contact with a shed located twenty-two and one-half inches from the car, it was held that the court could not say as matter of law that he was guilty of contributory negligence. It does not seem that the court considered the question of assumed risk as involved, and the statement of facts does not present what knowledge or means of knowledge the plaintiff had of the closeness of the structure.²

753. Where a platform for loading stone was maintained so near the track as to leave a space of about ten inches between it and the sides of a car upon the track, and a brakeman was injured while working there, by being pressed between it and a car, and it appeared he had been employed upon the road for some time, though he may not have known of the distance of this particular structure from the track, it was held that the risk was one he assumed. It was said that the master could not be expected to send an experienced man along to inform his employees of the existence of every structure upon the line of the road.³

754. Where a brakeman, while descending the ladder of a caboose, not in the discharge of his duty, but for some purpose of his own, was struck and injured by the supply-pipe of a water-tank, and it appeared he had been three months on the road, and had occasionally stopped at the tank, it was said: The inference is irresistible that plaintiff knew or ought to have known of the location of the tank and the dangerous proximity of the supply-pipe to the train. But mere knowledge of the danger is not a defense, but is a

¹ Sweet v. Mich. Cent. R. Co., 87 Mich. 559, 49 N. W. 882.

³ C., R. I. & P. R. Co. v. Clark, Adm'r, 108 Ill. 113.

² Kelleher, Adm'r, v. Milwaukee & Northern R. Co., 80 Wis. 584.

circumstance to be considered on the question of negligence. Whether or not he was guilty of negligence depends upon the use he made of such knowledge. The question was held to be one of the exercise of ordinary care, not assumed risk.¹

754a. An adult with six months' experience as brakeman on a freight train was injured while descending a car by contact with a water-tank placed near the track. It appeared that he was familiar with its location, having passed it almost daily during his term of service; that at the time of his injury he had his back to it and did not look to ascertain his peril, and at the particular time had no orders to descend the car. It was held that he was chargeable with negligence.²

755. Steps on dock.—Where a stairway for the use of employees on a coal-dock were steep and without a railing, and had steps at irregular distances, which defects were obvious, it was held that an employee who had used the stairway once or twice was chargeable with knowledge of such defects and assumed the risk of injury therefrom.³

756. Trenches and pits.—Where an employee had been for a long time engaged with others in removing a bank of earth by repeatedly undermining the same, and it finally fell causing his death, and it appeared he must have known as well as any one the danger attending the work, and yet made no objection, it was held that the risk was one assumed.⁴

756a. The risk of injury from the caving of an overhanging bank being worked with a steam-shovel was held to be open and obvious to one employed, and a risk assumed.⁵

757. Where an employee was injured by the falling of a bank of earth while working at the bottom of a deep shaft,

¹ *Wilson v. Louisville & N. R. Co.*, 85 Ala. 269, 4 So. 701.

For other cases, see 602 et seq.; PREMISES, 2974 et seq.

² *Pennsylvania Co. v. Finney* (Ind.), 42 N. E. 816.

³ *Sweet v. Ohio Coal Co.*, 78 Wis. 127.

⁴ *Rasmussen v. C., R. I. & P. R. Co.*, 65 Iowa, 236.

⁵ *Legnard v. Lage*, 57 Ill. App. 223.

and did not know there was a crack in the side of the shaft indicating that the earth was liable to fall, and it appeared the defendant knew of the existence of such fissure and failed to inform the plaintiff, it was held that the danger from such cause was not a risk assumed.¹

758. It was held that a servant working in a mine where he was exposed to danger from falling rock, threatened by a crevice which was known to the superintendent and unknown to such employee, did not assume such risk. That the master's duty was to take precautions to obviate the hazard and warn employees thereof.²

759. Where one of a gang of workmen while excavating a tunnel was injured by an earth slide occasioned by a crack in the soil, the result of blasting, of which he had knowledge, it was held that as the danger was apparent to the plaintiff personally he could not recover, though the foreman of the gang, also knowing the danger, ordered the plaintiff to work without notifying him thereof.³

760. Where an employee was injured by a bank of earth falling upon him, there being no concealed dangers, it was held he assumed the risk and therefore could not recover. It was said: Where the dangers are not concealed, but are open to the senses, the servant is ordinarily bound to know them. He must be presumed to have had the knowledge which common observation forces upon the most ordinary intellect, and to have known the effect and operation of the laws of gravitation and of undermining a bank of earth like this one.⁴

¹ *Strahlendorf v. Rosenthal*, 30 Wis. 674.

In *Naylor v. Railway Co.*, 53 Wis. 661, the court say, in reference to this case, "had the servant been fully informed of such danger it is clear . . . he could not have recovered, even though he might have proved that the sides of the

shaft were not properly secured or that it was not curbed in a safe manner."

² *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368.

³ *Anderson v. Winston et al.*, 31 Fed. 528.

⁴ *Pederson v. City of Rushford*, 41 Minn. 289, 42 N. W. 1063.

761. It was first held that an inexperienced laborer in digging a trench did not necessarily assume the risk of the sides caving in from the weight of a heavy timber placed close to it by the defendant's foreman. It could not be said that he had equal opportunity to determine the danger.¹

762. Upon a second appeal the foregoing decision was reversed, and it was held that the danger of the bank caving in was open to the observation of any man of ordinary mental capacity, and therefore the risk was one assumed.²

763. Yet where an experienced employee in building a foundation in a pit was injured by the skids breaking under weight of a heavy stone, which was being pushed into the pit, it was held that the risk was not assumed, in the absence of proof that he knew that the skid was defective in being too weak to hold the stone.³

764. An employee was held not to have assumed the risk of the falling of a cistern wall recently constructed, while he was working in the cistern shoveling dirt or gravel behind it, even though the pressure of the gravel may have in part caused it, in the absence of knowledge by the servant of such danger. It was said he might have assumed the risk of an embankment of earth falling upon him in a pit which he was digging, for that was the work in which he was engaged near this dangerous wall when killed by it, but that he assumed any of the risks of building the wall is not shown. He had nothing to do with the plans or mechanism of the wall.⁴

4. Safeguards.

765. Cogs and gearing, exposed.—Where an experienced employee was injured by contact with uncovered gears which were in plain sight and the danger therefrom was obvious, it was held that the risk was one which he had assumed.

¹ *Texas & Pacific R. Co. v. French* (Tex.), 22 S. W. 866.

² *Texas & Pacific R. Co. v. French*, 86 Tex. 96, 23 S. W. 643.

³ *Dillingham v. Harden*, 6 Tex. App. 474, 26 S. W. 914.

⁴ *Mulcairns, Adm'x, v. City of Janesville*, 67 Wis. 24.

It was said: It was immaterial that his attention had never been called particularly to the loom which caused his injury. It was sufficient if his duties were such that he might be called upon to work upon or near looms with covered or uncovered gears in different parts of the room, and he made no objection because some of the looms had uncovered gears.¹

766. Where an employee, nineteen years old, was injured in a saw-mill five days after he commenced work, by contact with exposed gearing located near his place of work, and it appeared that such cogs were not pointed out to him when he went to work, and he claimed he had no knowledge of their location and had not looked for them, though they were uncovered on the side next to him, and he could readily have seen them had he looked in the direction they were placed, it was held that whether the plaintiff ought to be held to have assumed the risk was properly a question for the jury. It was said that employees assume the risks incident to the employment and none others, unless the unusual or unreasonable risks are open and visible and known to and comprehended by the employee.²

767. Frogs, unblocked.—Where the cause of an employee's injury was the want of a block between the rail of the track and the guard-rail at a switch, where the employee was on duty, it was held that the defect and danger was so obvious that the employee, though inexperienced, must be charged with knowledge thereof as matter of law.³

768. Where an employee knew that some of the frogs in a railroad yard where he was at work were not blocked, as required by statute, and he was injured while coupling moving cars by his foot getting caught in one that had remained unblocked for two months, it was held that the question as to whether he had assumed the risk or was guilty of contributory negligence was for the jury.⁴

¹ Goodridge v. Washington Mills Co., 160 Mass. 234.

² Nadau v. White River Lumber Co., 76 Wis. 120.

For other cases see 615 et seq.

³ Mayes, Adm'x, v. C., R. I. & P. R. Co., 63 Iowa, 562.

⁴ Ashman v. Flint & P. M. R. Co., 90 Mich. 567, 51 N. W. 645. See Grand v. Railway Co., 83 Mich. 564,

769. It was held that a railroad company was not liable for the death of an employee caused by his foot getting caught in an unblocked frog, though it was the only one in the yard not blocked, where it appeared he had been working over it for a long time, and had an opportunity to become familiar with its character.¹

770. Where the manager of a switch-engine in defendant's yard, a place where he had worked for two years, was killed, his death being caused, as it was alleged, by the absence of a block between the rails abutting on a stub switch; and it was further alleged that the switch had not been blocked for five days before he was killed; that he was free from negligence, and did not then know the switch was not blocked, it was held that the complaint was not sufficient, in that it failed to show an absence of knowledge of the absence of the block previous to the hour of his death, since if he had such knowledge he assumed the risk incident thereto. It was said: If he knew, or had reasonable opportunities to know, of the omission of the master's duty, he had no right to assume that the duty had been performed. He was obliged to act with care and prudence in applying the two years of experience in the duties in which he was employed. If he had knowledge of the absence of the block, he was bound to apply that knowledge. If he had opportunities equal to those of his employer for gaining such knowledge, he will be presumed to have known, and will be held to have assumed the risks flowing from the absence of such block.²

771. Where an employee upon a train was injured by reason of his foot getting caught in an unblocked frog, and it was contended that he had no knowledge that the particular frog was unblocked, and it appeared that the system of blocking frogs upon the particular road was not in use, it

47 N. W. 837; McGinnis v. Can. So. don's Adm'r, 87 Va. 335, 12 S. E. R. Co., 49 Mich. 466, 13 N. W. 819. 786.

¹Richmond & D. R. Co. v. Ris- ²Ames v. Lake Shore & M. S. R. Co., 135 Ind. 363, 35 N. E. 117.

was said: That the switches on this line of road were unblocked was known to both master and servant, and whatever danger was incident thereto was apparent to both. The master and servant were upon an equality in this respect. The doctrine is well sustained by authority, that if the danger incident to the use of frogs and switches or other appliances or machinery was such as to be easily apparent to the servant, and he saw fit to continue in the service under such conditions, then he assumed all the risks incident thereto. It is held generally that the operation of a railroad without blocking its frogs is not, as a matter of law, negligence.¹

772. Where a railway was constructed without blocking its rails, and a competent man was employed in one of the company's yards as switchman where there were many switches and guard-rails, and, though employed for two and one-half months in switching in such yard every day, made no complaint, and thereafter was injured in stepping between a main and guard-rail, it was held that the condition of the railway tracks and the danger must have been known to him, and therefore he assumed the risk. That all the questions were of law for the court, and not of fact for the jury.²

773. Railing, absence of.—It was held that a servant who stood upon an unrailed platform two feet wide and attempted to pry off a pulley with a piece of scantling assumed the risk of the scantling breaking and causing him to fall, and the absence of a railing to protect him while performing the act.³

774. Switch-marker, absence of.—Where it was alleged that the cause of injury received by an engineer was the absence of a switch-marker to indicate the distance to a

¹Sheets v. Chicago & I. Coal R. Co., 139 Ind. 682, 39 N. E. 154. also, APPLIANCES, KIND; SAFETY GUARDS AND PRECAUTIONS.

²Rush, Adm'x, v. Missouri Pac. R. Co., 36 Kan. 129, 12 Pac. 582. ³Chesapeake, C. & S. W. R. Co. v. McDowell (Ky.), 24 S. W. 607.

For other cases, see 624 et seq.;

junction, and it appeared he had made several trips over the line, but only one over the branch upon which he was killed, and that there were no markers on the main line, but junction switches were never left open, and upon other branches the junctions were in cities or towns, it was held that the charge of the court was erroneous in omitting to submit the question whether such employee, in the exercise of reasonable care, ought to have known that there was no switch-marker at the particular junction.¹

E. *Equal Knowledge.*

1. Generally; Its Effect.

775. Rule.—In actions for injuries resulting to a servant from defective machinery or appliances, the real question is whether the servant has had equal opportunities with his employer for observing the defective machinery or materials and intends to waive any objection to them.²

776. An employee knowing, when he solicits and accepts employment which is given him, that he must use defective tools, contracts to take them as one of the risks of the service, whether anything is said of the dangerous character of the employment or of the defective and dangerous appliances or not. If the danger and defects are equally known to or open to the observation of both employer and employee, it can well and justly be said they stand on a common footing. Acceptance of an employment is an acceptance of the attendant risk. This, though the employment be rendered especially hazardous by the use of defective appliances.³

777. Where the employer and employee are equally competent to judge of the risks and hazards, and both have equal

¹ Union Pacific R. Co. v. Monden, 50 Kan. 539, 31 Pac. 1002.

² Dale v. St. L., K. C. & N. E. R. Co., 63 Mo. 455.

For other cases relating to opportunity to discover defects by servant, see EQUAL KNOWLEDGE, 775 et seq.; SERVANT'S DUTIES.

³ Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327.

knowledge of the surroundings, the employer cannot be culpably negligent as towards the employee, although the work may be dangerous or hazardous, and although it might be made safer by the employer if he chose to do so.¹

778. If a servant is fully aware of the hazards of the employment as the business is conducted, and has equal opportunities for knowing and equal knowledge with the master concerning defective appliances for doing the work, and with such opportunities and knowledge proceeds in the business, he assumes the risk of the service.²

778a. Where an employee, who was familiar with a machine, knew it was out of repair, and not readily stopped, was injured while cleaning it when in motion, his hand getting caught in the cog-wheels, he was held to have assumed the risk, though he was directed to do the work while the machine was in motion, and was assured that it was all right to do so, on the ground that the danger was as apparent to him as to the master.³

778b. Where an employee was injured by means of an apparatus used to level heaps of coal, in stepping over a rope while it was near the surface, and being caught and thrown as the rope became taut from the usual and ordinary action of the apparatus, with which he was familiar, it was held that the danger of being hoisted in the air if he attempted to step over the rope was an obvious one, and was as well known to him as to any one; therefore he assumed the risk, or was wanting in the exercise of due care.⁴

779. In the application of the rule due regard must be had to the limited knowledge of the employee as to such appliances, and the fact that he has the right to a certain extent to rely upon the superior knowledge of his employer.

¹ Rush v. Railway Co., 36 Kan. M. S. R. Co. v. Stupak, 108 Ind. 1; 129, 12 Pac. 582; Burlington, etc. Pennsylvania Co. v. Lynch, 90 Ill. R. Co. v. Liehe, 17 Colo. 280, 29 Pac. 333.
175.

³ Graves v. Brewer (N. Y.), 4 App.

² Bradbury et al. v. Goodwin, 108 Div. 327.

Ind. 286, citing Umback v. L. S. & ⁴ O'Brien v. Staples Coal Co., 165 M. S. R. Co., 83 Ind. 191; L. S. & Mass. 435.

It must often depend upon the kind of machinery used, whether intricate or simple in construction. For instance, a gardener could not be held guilty of actionable negligence in furnishing a hoe or shovel to his employee. It does not rest with the servant in such cases to say that the knowledge of the master is superior to his.

This was said where a section-hand was injured by the breaking of the rod which communicated the power to a hand-car. It was held that the hand-car was a simple piece of machinery and he had equal means of knowing its condition.¹

780. The statement of the rule evidently was not satisfactory to the California court, as they say: "It has often been said that the master is not liable for defects (in his appliances) to a servant whose means of knowledge thereof are equal to those of the master. But this is an erroneous statement—the master has no right to assume that the servant will use such means of knowledge, because it is not a part of the duty of a servant to inquire into the sufficiency of those things. The servant has a right to rely upon the master's duty being performed, and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them. The true definition is that, when the circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire. A servant is chargeable with actual notice as to matters concerning which it is his duty to inquire, and especially should this rule be applied where the servant's action is founded upon the assumption that the master ought to have known something which he did not actually know."²

780a. Where an employee selected a car-door to be used as a platform for discharging bales of wool from one car to another, knowing and having an opportunity to know its fitness and strength, equal to the master, and he was in-

¹ *Burlington, etc. R. Co. v. Liehe*,
17 Colo. 280, 29 Pac. 175.

² *Magee v. N. P. C. R. Co.*, 78 Cal.
430.

jured by its breaking, it was held that the risk was assumed and that he could not recover.¹

781. Where an employee was injured while changing a machine from the wrong side, it being more dangerous than if attempted from the other side, and it appeared the foreman was standing by while he was engaged in the act; that the employee was twenty-eight years old, had performed the act many times and was familiar with the dangers incident to the work, and the danger from changing the machine from the wrong side was apparent upon ordinary observation, it was held that he assumed the risk. It was said that where the foreman and laborer have equal knowledge of the danger accompanying the act to be performed, even though the foreman requests the performance, the master cannot be made liable.²

782. Where a sliding-door running up and down in grooves and balanced by weights had been for some time without its weights, and plaintiff, a day laborer, lifted it by main strength, and while he was reaching for a stick to hold it up it fell upon him causing him injury, he knowing that it was not in proper condition to be used, it was held that as he understood as well as any one what the actual condition was, he was not entitled to demand, instead of repairs, such future and secondary precautions as would make it safe for him to go on and use the defective door in an unnatural way.³

783. The doctrine was announced that where a servant contracts to work for his employer he assumes all the risks ordinarily incident to the business, and, where he has equal knowledge with the master of the danger attending the work, that he assumes the consequences of the risk if he continues in the employment, and applied to a railroad employee injured while cleaning out a large well. The curbing

¹ *Pennsylvania Co. v. Lynch*, 90 Ill. 333.

³ *Cunningham v. Merrimac Paper Co.*, 163 Mass. 89, 39 N. E. 774.

² *Kean v. Detroit, C. & B. R. M.*, 66 Mich. 277.

was rotten, the dirt was overhanging its edge, and for the two days he was thus working, prior to his injury, was frequently falling. His injuries were caused by a large mass of such overhanging dirt falling upon him.¹

784. Where an employee was injured by the caving in of a ditch in which he was working, caused by the melting of snow, and it appeared that he knew that the soil in that vicinity was liable to cave in when wet, but the defendant was not possessed of such knowledge, it was held that, as the plaintiff had better knowledge of the danger than the defendant, he assumed the risk.²

785. The master is not liable for an injury sustained by his servant in the course of his employment when the danger is of such a character that it must be as apparent to the servant as to the master, or when it is such that it could not be ascertained by either in the exercise of reasonable care and prudence.

This rule was stated and applied where a laborer engaged in digging a trench was injured by the caving in of the sides, caused by the character of the soil.³

786. An employee injured by the caving in of a ditch, which he is assisting to construct through a soil composed largely of sand and gravel, cannot recover for such injury, since the liability of the trench to cave in, and the danger, are alike open to the observation of all parties.⁴

787. Where a laborer was injured while engaged in excavating a tunnel, and it appeared that a crack was formed shortly after a blast in the afternoon of the day before the accident, and sometime during the morning there was a slide of earth which caused the plaintiff's injury, and it was claimed that the foreman of the gang saw the crack, but did not inform the men of the fact that it was a dangerous place, and the plaintiff was ordered to go to work there, and it further

¹ *G., H. & S. A. R. Co. v. Lempe*, 59 Tex. 19.

² *Fairmount Cemetery Ass'n v. Davis*, 4 Colo. App. 570, 36 Pac. 911.

³ *Carlson v. Sioux Falls Water Co.*, 5 S. Dak. 402, 59 N. W. 217.

⁴ *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747.

appeared that all the men at work except the plaintiff saw the crack, and plaintiff testified that he did not see it, it was said that it is obvious that if there was any danger it was as apparent to the plaintiff as to any one else. Judgment for the defendant was sustained.¹

788. Where a laborer alleged to have been ignorant and unable to understand the English language was injured while wheeling earth in a wheelbarrow, in uncovering a stone quarry, working under the direction of a foreman, and his duties required him to wheel the earth along a path two or three feet wide, where on one side was a precipitous excavation about fifteen feet deep, and on the other side was a wall of earth fifteen feet high, nearly perpendicular, and in some places overhanging the path, and as plaintiff with a wheelbarrow of earth was passing along the path, it being the spring of the year when the frost coming out of the ground increased the liability of danger, a part of the earth in the wall broke away and fell, striking plaintiff and his wheelbarrow and throwing him into the excavation. It was said: Plaintiff had worked in the same place from one to two weeks before the accident. He appears to be of mature years, and though perhaps ignorant of some things, of ordinary capacity. He must be presumed to have had the knowledge which common observation forces on the most ordinary intellect, to have known the ordinary effect and operation of the laws of gravitation and of thawing frost upon a particular bank of earth. He must be presumed to have known that from such causes the earth will break away and fall down, and that the fall must be attended with danger to any one in its way. As the danger was as well known to him as to the foreman, he must be taken to have assumed the risk and cannot hold others responsible for the consequences.²

788a. The rule was stated: It is a general principle that the servant assumes all the risks ordinarily incident to the business, and where he has equal facilities with the master

¹ Anderson v. Winston, 31 Fed. 528.

² Olsen v. McMullen, 34 Minn. 94, 24 N. W. 318.

for ascertaining the danger incident to labor in which he is engaged, he takes the risk upon himself; and applied where an employee was set to work by his foreman to dig a ditch on the top of an overhanging bank for the purpose of throwing it down, and he was injured by the bank giving away. It was said the work required was not of such a character as to require experience to know the danger attendant upon it. Any man of ordinary mental capacity should have known there was danger in dislodging an overhanging ledge.¹

789. The general rule was stated and applied, where a miner, who had been injured, after recovery went to work again and was again injured at the same place. It was said that an employee should leave the dangerous employment on discovery of the master's method of doing business, when he finds the master does not remedy the danger; and especially is this true when the danger is imminent or obvious from former injuries received in the place where employed.²

790. Where a master and servant are equally ignorant of the dangers incident to the work, the servant assumes the risk.

This expression or statement of a rule was made where the question was as to the danger incident to moving cars by staking, because of the liability of the stake in the hands of the person holding it to break.

Yet it was further said: Such danger is so obvious that a master may assume that a servant ordered to undertake it will see and comprehend the hazard, and he is not liable for failure to give warning.³

790a. Where an employee, who had been working about a round-house for some months taking engines in and out, was injured by an icicle dropping from the roof of the building, it was held that he could not recover; that he had

¹ *M., K. & T. R. Co. v. Spellman* A., T. & S. F. R. Co. v. Schroeder, (Tex. App.), 34 S. W. 298. 47 Kan. 315, 27 Pac. 965.

² *Morbach v. Home Mining Co.*, ³ *Watts v. Hart*, 7 Wash. 178, 34 53 Kan. 731, 37 Pac. 172. See, also, Pac. 423.

equal means with the defendant for observing the icicles and the danger therefrom.¹

791. Where the evidence showed that the danger to an employee who was injured while hauling lumber upon a truck must have been as obvious to him as to his employer, and there was no emergency requiring him to expose himself to the danger, and that, if free from fault himself, the negligence, if any, was that of a fellow-servant, it was held that a nonsuit was proper.²

792. Where an experienced well-digger was employed to clean out a well, and the rope furnished him for use was carefully examined by him and pronounced good and sufficient for the purpose, it was held that there was no negligence on the part of the plaintiff or defendant.³

793. Where the servant had been employed on the road for twenty months, and knew or must have known the manner in which the track was ballasted, and that it did not extend to the end of the ties, and he was injured by stepping into such space while coupling cars, it was held that the risk was assumed.

The rule was stated to be, that where a servant has equal knowledge with the master of the defects existing in the appliances, he will be deemed to have waived his right of action for damages arising from injuries resulting from such defects.⁴

794. Where the injury complained of was caused by coupling cars of uneven height, it was said: The difference in the elevation of the coupling irons would not have been very readily or easily observed when they were distant from each other, and yet the company is sought to be held liable for its want of ordinary care in not knowing this difference when taking this car into its train. When the car and caboose were brought nearly together, this difference could have been at

¹Johnson v. Oakes, 70 Fed. 566.

³Reid v. Central R. & B. Co., 81

²Hazlehurst v. Brunswick Lbr. Co., 94 Ga. 535, 19 S. E. 750.

⁴Clark v. Missouri Pac. R. Co., 48 Kan. 654, 29 Pac. 1138.

least much more readily seen and observed by comparison. The company is charged with negligently endangering the lives of its brakemen by not knowing this difference, and, if presumed to know, in allowing this car to be attached to its train; and the intestate is alleged to have been in the use of proper care when he endangered his own life by not seeing, observing or knowing of such difference in the elevation of the company's couplings. Did not the intestate have the same, if not superior, means of knowing of this difference to that of the company? If the negligence of the intestate and that of the company are equally balanced, ought the plaintiff to recover? The duty of the company to know this difference is not absolute, and it is not presumed to know of it as matter of law.¹

795. Where an employee was injured while operating a planing machine to which the power was applied by a large belt, the motion of which was very rapid, and it appeared he was familiar with such machinery, and that the fastening of the belt had become insecure so that it was liable to break apart, and he had called the foreman's attention to it, but he declined to repair it and told the plaintiff to go on with the use of the machine, it was held that he must be deemed to have known the risk, which was as apparent to him as to any one, and to have assumed it.²

2. Servant's Duty to Inform Himself as to Defects and Dangers.

796. Rule.—The master has a right to expect, and such is the servant's duty, that he will use reasonable care in examining his footings and surroundings. He has a right to rely upon the probability that any one would know what was generally to be seen by his own observation.³

¹ Kelly, Adm'r, v. Abbot, 63 Wis. 309.

² Anderson v. H. C. Akeley L. Co., 47 Minn. 128, 49 N. W. 664.

³ Ragon v. Toledo, A. A. & N. W. R. Co., 97 Mich. 265, 56 N. W. 612; Batterson v. C. & G. T. R. Co., 53 Mich. 125; Langlois v. Railroad Co., 84 Me. 161.

796a. An employee must take ordinary care to observe and ascertain whether any and what dangers are incident to his service, and must be held to have ascertained and known of such dangers as ordinary care would have disclosed.¹

797. There are certain correlative duties on the part of the employee to the master. Of these one is the duty to be reasonably observant of the machinery he operates, and to report any defects he may discover therein to the employer; another is, to use ordinary care to avoid injuries to himself; for the employer is under no greater obligation to care for his safety than he himself is. He must always obey the rules of the company prescribed for his safety, and which are brought to his knowledge; and he must inform himself, as far as he reasonably can, respecting the dangers as well as the duties incident to the service upon which he enters.²

798. While an employee has the right to presume his employer has discharged his duty, yet this rule cannot exempt him from the duty of exercising reasonable care. He cannot exempt himself from the duty of making a prudent and reasonable use of his faculties, or of heeding with due care facts open and visible to ordinary observation.³

799. Where a servant enters an employment in a dangerous business, he has a right to believe that the machinery furnished him to do the work allotted him is not only suitable for the purpose, but that reasonable care had been taken by his employer to see that it was safe for the purposes for which it was to be used. This, however, does not absolve the servant from the duty of informing himself of any patent defect in either the construction of the machine or in the manner of using it, even if it is found that the defendant was negligent in the failure to exercise proper care in furnishing appliances, whereby an unsafe appliance is pro-

¹ *Writt v. Girard Lumber Co.*, 91 R. C. 157; *Wormell v. Railway Co.*, Wis. 496. 79 Me. 397-406.

² *Alcorn v. Chicago & Alton R. Co.*, 108 Mo. 81; *Darracott v. Railway Co.*, 83 Va. 288, 31 Am. & Eng. Ind. 50.

³ *Rogers et al. v. Leydon*, 127

vided; yet in order to fix responsibility upon the master for injuries occasioned to such an employee by such a defective appliance, it must appear that the defect was not sufficiently obvious to be noticed by such servant, and was not in fact observed by him.¹

800. The doctrine that a servant has a right to assume that his master has furnished him a safe place in which to work does not apply where dangers are apparent. It was said: No sane man is expected to act upon an assumption which he knows to be false. It is a man's duty to exercise common sense when in the employment of a master as well as at any other time. The master has a right to rely upon the servant doing this.²

801. The employee is not under like obligation as the master to resort to means for the discovery of defects. He has a right to presume that his employer has done his duty and complied with the requirements of the law, and it is only when he has knowledge of the defects in the machinery which he is required to use, and continues to use without objection, that he is presumed to waive the defect. "It is not true then," conclude the court, "that the plaintiff's right of recovery is defeated by the use of machinery without objection when he has simply the means of knowledge or defects therein the same as his employer."³

802. While the employer has a right to expect that an employee will be vigilant to observe, and that he will be on the alert to avoid all known and obvious perils, yet the latter is not bound to search for defects or inspect the appliances furnished him to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are duties of the master, and unless the defects are such as to be obvious to any one giving attention to the duties of the occasion, the employee has a right to

¹ Schall v. Cole, 107 Pa. St. 1.

³ Muldowney, Adm'r, v. Illinois

² Jennings v. Tacoma R. & M. Co.,
7 Wash. 275, 34 Pac. 937.

Cent. R. Co., 36 Iowa, 462; Same
Case, 39 Iowa, 615.

assume that the employer has performed his duty in respect to the implements and machinery furnished.¹

803. The rule was, however, subsequently stated to be, that if the defects of the machinery used are known to the employee, or are discernible by him in the exercise of ordinary care, and he remains in the employment without protest and without inducement or promise that the defects shall be remedied, he will be presumed, in the absence of evidence to the contrary, to have waived his objections to the defects; and applied where an engineer had the same means of knowledge of defects in the engine which he was using as his employer.²

804. Brakeman; character of couplings.—It was said a brakeman, although he may have the opportunity of doing so, is not required to go around and under the trucks with lantern and hammer for the purpose of ascertaining whether there may be any flaw or crack in a wheel or axle. The company employs persons to perform this duty, and a brakeman has a right to suppose they will perform it properly. At the same time he must make a reasonable use of his senses, and if a defect is apparent and patent and would have been discovered by the exercise of reasonable and ordinary care in view of the position which the brakeman occupies, the law conclusively presumes that he possesses the knowledge which reasonable attention would furnish. *Muldowney v. Railway Co.*, 36 Iowa, 462, distinguished, and the same case, in 39 Iowa, 615, approved. The question was whether a brakeman ought to have known of the character of the dead-woods upon an engine and a National Line car.³

805. Where a brakeman was injured by the cars coming close together owing to an alleged defect in the bumpers,

¹ Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566; Ohio & Miss. R. Co. v. Percy, 128 Ind. 197. ³ Way v. Illinois Central R. Co., 40 Iowa, 341; Porter v. H. & St. J. R. Co., 71 Mo. 66.

² Lumley v. Caswell, 47 Iowa, 159.

and, among other things, the court charged that if the jury believed the bumper was defective, and had been allowed to remain so by the defendant, the plaintiff was entitled to recover, even though he may have been able to discover such defects by the use of ordinary care and diligence, it was held that such charge was not erroneous, as the employee has a right to presume without inquiry or examination that the appliances furnished him were safe.¹

806. It was held that an experienced brakeman assumed the risk of a defect in the coupling apparatus that he might have discovered upon paying proper attention, and especially where he was required by a rule of the company to take time and examine all machinery before exposing himself to danger.²

807. Where a brakeman was injured in coupling cars of uneven height by the use of a straight link instead of a crooked one, it was said that it was his duty to observe the cars and their couplings, so as to determine, before coupling them, what kind of a link should be used. The failure to observe the disparity in the height of the draw-bars or his miscalculation as to the necessity for the use of a crooked link, and his failure to use a crooked link, was negligence on his part, but for which the accident would not have occurred.³

808. Where a brakeman was injured by reason of an alleged defect in a coupling, it being short and the draw-bars to be connected being of uneven height, it was said: To entitle him to recover, it is sufficient for him to show that he did not know of the defect before using the coupling. The limit of inquiry in such case is whether, as matter of fact, the employee did, before exposing himself to danger, know that the appliance was defective. A brakeman is never in-

¹ *Evans v. Chamberlain*, 40 S. C. 104, 18 S. E. 213. *Brewer v. Flint & P. M. R. Co.*, 56 Mich. 620, 23 N. W. 440.

² *Karrer v. Detroit, G. H. & M. R. Co.*, 76 Mich. 400, 43 N. W. 270; ³ *Norfolk & Western R. Co. v. Emmert*, 83 Va. 640.

trusted with the duty of inspecting, and therefore cannot be reasonably expected or required to know whether all machinery and appliances of a railroad train are in proper condition.¹

809. Condition of brakes.—It was held that an instruction, in effect, that it was the duty of a brakeman to know whether or not the brakes and brake-staffs upon the cars of the train are in good and safe condition, and if he undertook to use or operate them without informing himself as to their condition, and was injured by a defect therein, he could not recover, was contrary to all modern authority and was properly refused. It was said: The employee has the right to proceed to use appliances for the operation of a train without stopping to investigate the sufficiency or soundness of the appliances, unless the defect is so apparent as to convey to him knowledge of its unsafe and dangerous condition upon his approach without investigation. He is not bound to search for defects or to test the appliance in advance of using it.²

810. Where, however, a rule exists, known to the employees, which requires them to examine the brakes and know their condition, a failure to perform this duty is negligence.³

811. It was held, where a brakeman had but a few moments to become acquainted with the character and condition of a brake, and determine whether he could safely use it, during which time he was engaged in coupling cars and other duties, that it could not be said as matter of law that he was guilty of contributory negligence in its use.⁴

812. An instruction that the law does not require of a brakeman that he should absolutely know of all the defects of construction and all the obstructions there may be along the line of the road, nor that he should neglect the performance of his duties as a brakeman to be on the constant look-

¹ Louisville & N. R. Co. v. Foley, 94 Ky. 220, 21 S. W. 866.

² Ohio & Miss. R. Co. v. Pearcy, 128 Ind. 197.

³ L. E. & St. L. Con. R. Co. v. Utz, 133 Ind. 265.

⁴ Philadelphia & Reading R. Co. v. Huber et al., 128 Pa. St. 63.

out for such obstructions and objects which may be considered dangerous, was held not error.¹

813. Condition of track.—The doctrine that the servant, in entering upon the employment, assumes all its ordinary hazards is subject to the qualification of such as are patent, such as he actually knew or would be presumed to know. The presumption, when it applies, has reference to machinery or appliances which his particular line of duty requires him to deal with and inspect; hence it was held that in the absence of actual knowledge, no presumption would apply to a brakeman that he ought to, or would, know the defective condition of a railroad track by its ties being rotten.²

814. Where a brakeman was injured while climbing the ladder of a car, by contact with a rock projecting from the side of a cut, it was said: Trainmen, having no functions to perform in respect to the construction and maintenance of the roadway, have a right to assume its adaptation and sufficiency in all respects to a safe discharge of these duties in another and distinct branch of the general service, and are not held to a knowledge which has never been, in point of fact, imparted to them of defects and dangerous conditions in culverts, bridges, tracks, embankments, road-beds, cuts and tunnels of the railway company, or of the dangerous nature of adjacent structures erected or permitted by the company.³

815. Carpenter; condition of the walls of a building.—It was held that a carpenter working upon the roof of a building in process of construction was not bound to inspect the condition of the walls, and did not take the risk of the fall of the building in consequence of their insufficiency.⁴

815a. Where a carpenter in defendant's repair shop, while assisting, in obedience to defendant's foreman's order, in pushing cars, was injured by the fall of a running board which

¹ Chicago & Alton R. Co. v. Johnson, 116 Ill. 206, 4 N. E. 381.

² H. & T. C. R. Co. v. McNamara, 59 Tex. 255.

³ Georgia Pac. R. Co. v. Davis, 92 Ala. 300, 9 So. 252.

⁴ Giles v. Diamond State Iron Co. (Del.), 8 Atl. 368.

had been improperly left in a dangerous position between the cars, and though neither plaintiff nor the foreman knew that the board had not been removed, plaintiff might have seen it had he looked, it was held proper to direct a verdict for the defendant, since plaintiff was negligent in failing to look. It was said: Where the danger is alike open to the observation of all, both the master and servant are upon an equality, and the master is not liable for an injury resulting from the dangers of the business. In cases where the servant is one of mature age and experience, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to prevent danger. This is not a case where the master had furnished an unsafe place, machinery or appliances with or in which he required his servant to work, nor is it a case where the danger was known to the master and unknown to the servant, but is a case wherein the place and appliances were all safe and suitable, if the servant would only use his senses with ordinary prudence and care. He had the same opportunity of knowing of the danger that the master had, and in such a case it has been held that the injured servant must, in order to recover, aver and prove he did not have the means of knowing equally with the master of the danger and of the means of avoiding it.¹

816. Conductor; condition of brake-chain.—It was held to be the duty of a conductor of a train, not only to exercise ordinary and reasonable care and diligence in the management of the train, but also in the due inspection of the cars, machinery and apparatus of the train as to their sufficiency and safety; and if he receives an injury owing to his neglect in those respects, or from a defect which could have been known to him by the exercise of such care, he cannot recover from the employer.

The facts were that a conductor was injured by the breaking of a brake-chain while operating a brake; whether it

¹ Day v. Cleveland, C., C. & St. L. R. Co., 137 Ind. 206, 36 N. E. 854.

was an old defect, or whether his act was the cause of its breaking, did not to any certainty appear; whether it could have been discovered by ordinary care on the part of the company or plaintiff was not made certain.

It was said, in effect: If the defects were unknown to both parties, neither party would be in fault; but the plaintiff's injuries would be attributable to accident, the risk of which he assumed.¹

817. Employee in a cotton-seed oil mill.—Where an employee in a cotton-seed oil mill was injured the evening of his first day's work with a machine therein, though he had been otherwise employed about the mill for some time, by his hand getting caught in exposed gearing while he was cleaning up around the machine, and it appeared the cogs were boxed when the machine was first bought, but the boxing had become broken, and it also appeared the light was dim, which rendered the act more dangerous, and these defects were alleged as a ground for recovery, and the plaintiff having been nonsuited, the following rule was stated as applicable to the case:

“Where the chief duty of an employee is to feed a mill, and an incidental duty embraced the duty of cleaning up around it of material scattered in the process of feeding, it is incumbent upon him to look at the machine and observe every plain and constantly visible characteristic in its construction and working which renders the necessary cleaning up dangerous. If, after working all day, he undertakes to clean up at night, the omission of the employer to supply proper light for the occasion would not excuse the employee for exposing himself to unseen and unknown danger in the dark which he ought to have discovered had he made proper use of daylight.”²

818. In a railroad yard.—Where an employee was directed in selecting cars not to use any cars that were damaged in any way, and to send imperfect ones to the shop

¹Mad River & L. E. R. Co. v. Barber, 5 Ohio St. 541.

²Stubbs v. Atlanta Cotton-Seed Oil Mills, 92 Ga. 495, 17 S. E. 746.

for repairs, and it appeared that he knew, or might have known had he made an examination, that the car which caused him injury and which was selected by him was imperfect and out of repair, it was held that it was error to send the case to the jury; that he should have been nonsuited.¹

819. Where an employee in a mill was injured while engaged in removing lumber to the runway of a saw by his finger getting caught in a cog, and such runway consisted of live rollers, in each of which was an unprotected cog, which was somewhat obscured, but which he could have seen at any time if he had looked, when the mill was clear of lumber, and his testimony was to the effect that he did not know the cogs were there, it was said that men when they are working around dangerous machinery must notice. Their faculties and senses are given them for the purpose of self-preservation, and they must exercise them to a reasonable extent. Three days' observation of this machinery around which this man was working would naturally make him acquainted with all the cogs, and if he did not exercise discretion or thought or care enough, and pay sufficient attention to their location to know where they were, he cannot complain. The dangers were apparent and were assumed.²

820. Where an employee was injured while working near a fence which had been detached by other employees by taking up the posts and placed in such a position that a wind would blow it down, it was said: Here the injured servant had as good an opportunity to know of the danger to which he was exposed as the master or any one else, and the means of avoiding such danger were as much within his reach as within the reach of the master or any one else, and yet he worked on without looking or observing or heeding the same. The law requires that men shall use the senses with which nature has endowed them, and when one without excuse fails to do so, he alone must suffer the conse-

¹ Shields v. N. Y. C. & H. R. R. Co., 133 N. Y. 557.

² Olsen v. McMurtry Cedar Lbr. Co., 9 Wash. 500, 37 Pac. 679.

quences; and he is not excused when he fails to discover the danger if he made no attempt to employ the faculties nature has given him. If he could by reasonable and careful human foresight have foreseen and guarded against the injury complained of, he was guilty of contributory negligence, and his administrator cannot recover because of his failure to guard against it. It may be said in that case, if he worked on without objection or complaint, that he assumed the risk as one of the dangers incident to the business, and, if neither the servant nor the master could by care and prudence have foreseen and guarded against the danger, then neither party could be held guilty of negligence. In such case the danger was one of the risks incident to the business which the employee assumed. If such employee could not by such reasonable and careful human foresight have foreseen and guarded against the injury, and for that reason was not guilty of negligence, then for the same reason the other employees who caused the panel of fence to be set up could not by such human foresight have foreseen and guarded against such dangerous consequences and therefore are not negligent in placing it there.¹

821. Where an employee was injured by the falling of a door caused by a defect in the manner the rope which sustained it was fastened, and the court refused to charge that, if he had the same means of knowledge of the defect as the master, he could not recover, it was held that such refusal was proper, it appearing that it was no part of his duty to inspect the machinery or appliances used.²

822. Engineer; condition of the track.— While a servant in the use of appliances is bound to take notice of those dangerous defects of which he has knowledge and which are obvious to his senses, yet he is not bound to investigate for himself a department of work with which he has nothing to do, and to set up his judgment against that of the master. Hence it was said that an engineer of a railroad,

¹ *Diamond Plate Glass Co. v. De Hority*, 143 Ind. 381, 40 N. E. 681. ² *Austin et al. v. Appling*, 88 Ga. 54, 13 S. E. 955.

though having knowledge that the rails of the track were old, light and well worn, is not bound to pursue the inquiry, and determine for himself at his own peril whether the road is or is not in a fit condition for use, nor is he bound to quit the service; nor does he assume all risk from want of repair, unless the track was so far out of repair to his knowledge that it would be necessarily dangerous, to the mind of a prudent person, to run an engine over it.¹

823. It was said, however, that where an engineer has the same means of knowledge of defects in the engine which he is using as his employer, he cannot recover for injuries caused by such defects.²

824. When a locomotive engineer, without fault on his part, first discovered a defect in the engine after he had commenced his trip, it was held that he was not bound to immediately abandon the same if the defect was not apparently such as to render the engine immediately dangerous if handled with great care, and if the risk was not greater than an ordinarily prudent person would have taken under the same circumstances.³

825. Repair-man, telephone line.— Where an employee of a telephone company was injured by the breaking of a pole while he was at work removing useless or dead wires, it was held that a charge, in effect, that he had a right to assume that the pole was safe and suitable, and that it was not his duty to inspect the pole, was objectionable, as there was a question of fact in the case as to whether his duties required him to inspect the condition of the pole, and also that it relieved him from the duty of ordinary care and caution, by inspection or otherwise, in ascertaining the condition of the pole, the extent of the danger, and guarding against it as far as reasonably practicable.⁴

826. Section-master, as to condition of hand-car.— A section-master, in temporary charge of a hand-car, must note

¹ Devlin v. W., S. D. & P. R. Co.,
87 Mo. 545.

³ Fordyce v. Edwards, 60 Ark. 438,
30 S. W. 758.

² Lumley v. Caswell, 47 Iowa, 159.

⁴ Cumberland Tel. & Tel. Co. v.
Loomis, 3 Pickle (Tenn.), 504.

such defects in it as are discoverable in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it if it be obviously unsafe, otherwise he cannot recover for an injury to himself caused by its defective condition. If the defect is such as to deceive human judgment, the company, as well as the plaintiff, stand excused.¹

827. Where a section foreman was injured while riding on a work train in charge of his crew, by reason of the engine and cars leaving the track, owing to the defective condition of the track, and such accident occurred upon a part of the track other than that which was within his duties to repair and inspect, it was said: He had a right to assume that a part of the road which he was not required to inspect or repair was in a reasonably safe condition. The rule is that if the employee knows of the defect which causes injury to him he assumes the risk, but he is not bound to exercise care in knowing this, unless it is in the line of his duty.²

828. **Switchman; defective construction of track.**—A servant is not bound to inspect the appliances of the business in which he is employed to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only required to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known of defects, or that he had the means and opportunity of knowing them, will not preclude him from a recovery unless he did in fact know of them or in the exercise of ordinary care ought to have known of them. He is not bound to make an examination to find defects. There is no such legal obligation imposed upon him. That is the duty of the master.

This was said where a switchman was injured the first night of his employment in the particular yard, by being run over by the cars which he was attempting to couple,

¹ Georgia R. & B. Co. v. Kenney, 79 Tex. 104, 14 S. W. 918, citing 58 Ga. 485. Railway Co. v. McNamara, 59 Tex.

² Taylor B. & H. R. Co. v. Taylor, 255.

alleged to have been caused by the defective construction of the embankment and track.¹

829. Where it was claimed by a switchman who was injured while coupling cars that the failure of the defendant to keep the space between the ends of the ties properly filled was the cause of his injuries, and he testified he did not know of the condition of the track at the place of the accident, it was held that it was not error in the court to refuse to charge that it was his duty to inform himself of the condition of the tracks. It was said: We think no such duty of inspection prior to taking service or during his term devolved upon the plaintiff. He was simply bound to notice those obvious defects in the tracks or in other appliances which he had an opportunity to notice in the discharge of his duty as a switchman, and he is only affected with knowledge of such obvious defects as he is shown to have had an opportunity to learn before the injury complained of was sustained. It would seem the court assumed that the track was defective by reason of the space at the end of the ties not being filled, as it does not appear there was any proof upon that question.²

3. To Report Defects.

830. Rule.—It is the duty of servants to see that the appliances used by them are in a fit condition for use and to report defects if any are found to the master; but this rule is subject to the qualification that the servant so using the appliance has knowledge of its defects, or by reasonable precaution might have had such knowledge.³

831. A workman who has charge of or uses appliances in the performance of his work is required by law not only to

¹ Little Rock, M. R. & T. R. Co. Ill. 492; St. Louis & So. R. Co. v. v. Leverett, 48 Ark. 333. Britz, 72 Ill. 256; Toledo & W. W.

² Little Rock & M. R. Co. v. R. Co. v. Eddy, 72 Ill. 138; Kroy, Moseley, 56 Fed. 1009 (C. C. A.). Adm'x, v. C., R. I. & P. R. Co., 32

For other cases see OPPORTUNITY Iowa, 357; Crutchfield v. Richmond & D. R. Co., 76 N. C. 320.

³ C. & N. W. R. Co. v. Jackson, 55

use such care as to their condition as will save himself from personal injury, but his duty to his employer and himself requires that he exercise proper watchfulness in order to preserve such appliances in a condition which will render them safe and fit for the purpose for which they were designed; and if repairs are required he must either make them himself or report the condition of things to his employer or other person whose duty it is to make such repairs.

This rule was applied to an employee injured by the fall of defective stairs for which he was responsible.¹

832. The duty which the master owes to his servants is to provide them with safe tools and machinery where that is necessary. When he does this he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess.²

833. The principle above stated held not to apply to a rope used in a derrick. The master is bound to know that a rope under such circumstances will last only a limited time. It cannot be said the servant knows as well as the master. It is the duty of employers to renew instruments of that character at proper intervals.³

834. It is the duty of a servant to notify the master when anything is out of order in his particular department, and if he neglects so to do and continues in the employment and is injured he cannot recover.⁴

835. Baggage-man.—Where an employee was injured by reason of a truck, used for handling baggage, tipping, causing trunks loaded thereon to fall upon him, and the condition of such truck was old and worn, with some of the platform

¹ *Stroble v. C., M. & St. P. R. Co.*, 70 Iowa, 555.

³ *Baker v. Allegheny Valley R. Co.*, 95 Pa. St. 211.

² *Baker et al. v. Allegheny Valley R. Co.*, 95 Pa. St. 211; *Philadelphia & Reading R. Co. v. Hughes*, 119 Pa. St. 301.

⁴ *Crutchfield v. Richmond & D. R. Co.*, 76 N. C. 320.

or flooring broken, and such defects, in connection with the absence of a nut from a bolt which ordinarily held the truck from tipping, was the cause of the accident, it was said: The employee was bound to use such care in the use of the implement as men of ordinary prudence would ordinarily use in his situation while performing the same duties resting upon him, but beyond the exercise of such care the duty does not rest upon the servant to keep the instrument or tool he uses in repair, nor search for and report defects, unless by the contract or the nature of the employment that duty is devolved upon him.¹

836. Brakeman.—The rule was applied to a brakeman who was injured by defects in the ladder of a car. It was said that, should it appear that the car having the defective ladder had been used while he was brakeman upon the train of which it was a part, he will presumed to know of its defective condition.²

837. Employee.—Where an employee knows of the defects in the machinery from which the injury happened, and yet remains in the service and continues to use the machinery without giving notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is not entitled to recover; and further, if the employee himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by a defect in the machinery through the negligence of the employer.

This rule was stated where an employee was injured while attempting to adjust a belt while the machinery was in motion. The defect complained of was the absence of a loose pulley. He was a blacksmith, and had performed the same service continually for sixteen or eighteen months. He tes-

¹ Missouri Pac. R. Co. v. Crenshaw, 71 Tex. 340, 9 S. W. 262. Ill. 492. See, also, St. Louis & So. R. Co. v. Britz, 72 Ill. 256; Toledo,

² C. & N. W. R. Co. v. Jackson, 55 W. & W. R. Co. v. Eddy, 72 Ill. 138.

tified he had never had any experience with machinery and did not know that it was any more dangerous to put a belt on a pulley while it was in motion than it was to strike a piece of iron with a hammer. He had to use a ladder, which brought him close to the revolving shaft.

The jury having found for the plaintiff the judgment was affirmed.¹

838. Flagman.—This rule was applied to a flagman who was injured while attempting to board a moving locomotive knowing that the step was broken.²

839. Section-master.—It was held the duty of a section-master to make temporary repairs upon his car, if such as could conveniently be done, and if not to report its condition to the repair department, and if he used such a car, with knowledge of defects therein, he did so at his own risk.³

F. Appreciation of Danger.

840. Rule.—Where a party works with or in the vicinity of a piece of machinery insufficient for the purpose for which it is employed, or for any reason unsafe, with a knowledge or means of knowledge of its condition, he takes the risk incident to his employment in which he is thus engaged.⁴

841. This statement of the rule was subsequently said to be incomplete, in that it did not include an essential element, to wit, that of a knowledge of the dangers and risks likely to result from the use of such appliances. In other words, the employee must not only have knowledge or be chargeable with knowledge of the defect, but it must convey to a mind like his an appreciation that there is risk and danger from the defect.⁵

842. It was said that a servant cannot be said to take the risk of working with defective appliances unless he knows

¹ Washington, etc. R. Co. v. McDade, 135 U. S. 554.

² N. Y., L. E. & W. R. Co. v. Lyons, 119 Pa. St. 324.

³ Pleasants v. Raleigh & A. A. L. Co., 95 N. C. 195.

⁴ McGlynn v. Brodie et al., 31 Cal. 377.

⁵ Sanborn v. Medera Flume, etc. Co., 70 Cal. 261; Colbert et al. v. Rankin et al., 72 Cal. 197; Bjorman v. Fort Bragg Redwood Co., 104

not only the condition of things, but also that danger exists in such condition. If, however, the danger is obvious, knowledge of the condition of things need only be shown.¹

843. One does not ordinarily assume a risk who merely knows that there is some danger without appreciating the danger. On the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and degree of the danger and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture. Sometimes the circumstances may show as matter of law that the risk is understood and apprehended, and often they may present in that particular a question of fact for the jury.²

844. Where it requires skill and judgment by the servant, not possessed by ordinary observers, to give knowledge of hazards that may be apprehended from the character or condition of appliances or obstructions, he does not assume these hazards, unless possessed of such requirements.

This was said where an employee was injured by the girders giving way upon which an engine, used in connection with the construction of an elevated road, moved. It was held that whether such employee, under the circumstances, had knowledge of the danger was for the jury.³

845. Where a laborer was injured while tearing down a stone arch by the falling of a portion of the same caused by its being weakened by heavy rains, it was held that the evidence sustained a finding that the danger of the falling of such arch was apparent to an experienced mason, but not to a common laborer, and therefore it could not be said that he had assumed the risk.⁴

Cal. 626; *Mullin v. California Horse Shoe Co.*, 105 Cal. 77.

³*Davidson v. Cornell et al.*, 132 N. Y. 228.

¹*Anderson v. Clark*, 155 Mass. 368.

⁴*Gill v. Homrighausen*, 79 Wis. 634.

²*Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155; *Mundle v. Hill Mfg. Co.*, 86 Me. 400.

846. It was said: The fact that the defect in an appliance was open to plaintiff's inspection (the flange on an engine-wheel badly worn), and that he knew it was worn, would not necessarily defeat a recovery where it was a matter of skill and judgment, which he did not possess, to know how much wear and tear it would stand.¹

847. It was held that whether an employee in descending icy steps in going from the employer's factory assumed the risk was, under the circumstances, a question for the jury, upon the ground that she may well have misapprehended the extent of the difficulty and danger which she would encounter.²

848. Where the duty to be performed required the operator to reach over revolving cogs to close what was called a gate, which required considerable exertion, and which could more readily and rapidly be accomplished by a strong and vigorous man than one of more moderate powers, and such duty was attempted by a minor, who was inexperienced, and who had only been at work four days, and he was injured while making the effort by contact with such cogs, it was said that, as knowledge of the degree of peril to which he was exposed could only be learned by actual experience, the danger did not depend solely upon the patent facts.³

849. Where the trial court charged, in effect, that knowledge of the intestate, who was a youth of eighteen years, of the fact that rails were unblocked, was knowledge of the attendant danger, it was said: Whether he had knowledge or appreciated the danger, or ought to have done so, was a question for the jury. That service about the unblocked rails was attended with danger, and the knowledge of the fact that the rails were unblocked, did not necessarily imply

¹ *Bridges v. St. L., I. M. & S. R. Co.*, 6 Mo. App. 389.

² *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155; *Mahoney v. Dore*, 155 Mass. 513; *Osborn v. London & N. W. R. Co.*, 21 C. B. D. 220.

³ *Rummel, Adm'x, v. Dilworth*, 111 Pa. St. 343. See, also, *Philadelphia & Reading R. Co. v. Hughes*, 119 Pa. St. 301.

knowledge of the attendant danger. Knowledge of the danger was itself a question of fact.¹

850. It was said that, in the absence of notice to the contrary, a servant has a right to assume that the master will perform the duty imposed upon him of furnishing proper, adequate and perfect implements and appliances necessary for the performance of any duty required of the servant.

This was said in reference to an appliance called a "jigger," used for the purpose of loading car wheels upon cars, where a carpenter without experience in this work, and without knowledge of the defect, was called to assist in loading car wheels, and while so employed was injured by reason of the worn and defective condition of such appliance. It was held that the question of plaintiff's contributory negligence was for the jury.

To the suggestion that the plaintiff might have seen the defect it was said: True, but he did not know the effect of such deficiencies, and was moreover directed by his superior to get and use the implement, and whether under those circumstances he should be charged with knowledge and with negligence was a question for the jury.²

851. It was said that a person engaging to do work in and about the construction of a railroad assumes the risk of such employment, including the risk of being transported to and from his work in a construction train over a newly-constructed road, and cannot expect the road and road-bed to be in a perfect and safe condition before it is finished, as if the same had been completed and opened for public travel. Yet it was further said: A laborer unskilled in railroad building, even if he has aided in repairing defects in a newly-constructed road, is not necessarily chargeable with notice of the defective condition of the road-bed. If the danger is not apparent to a mind like his, and he does not know or

¹ Davis v. St. Louis, I. M. & S. R. 17; Bauer v. Railway Co., 46 Ark. Co., 53 Ark. 117, 13 S. W. 801. See, 388.

also, Railway Co. v. Leverett, 48 Ark. 333; Fones v. Phillips, 39 Ark. ² Kain v. Smith, 89 N. Y. 375.

have the means of knowing it, he may incur the danger under the order of his master without being guilty of contributory negligence.¹

852. A laborer in a saw-mill was injured by getting his clothing caught in exposed gearing. It was near his place of work, where he had been employed for twenty days, and so obvious that it was not contended but that he knew it was there. He testified, however, he did not know, and had never been told, that it was dangerous or cautioned to keep away from it. It was said: A servant is bound to use his senses and cannot be heard to plead ignorance of a danger that was obvious to any one on inspection; yet the mere fact that a servant knows the defects does not necessarily charge him with contributory negligence or an assumption of the risks growing out of those defects. The question is, did he know, or ought he, in the exercise of ordinary common sense, to have known, the risks to which the condition of the instrumentalities exposed him. It cannot be said, as matter of law, that the risk or danger was so obvious upon inspection that plaintiff ought to have understood it.²

853. Where a boy, engaged as a helper upon a carding machine, was injured by his hand getting caught in the gearing of the machine, and it appeared he knew how to do the work and had been cautioned not to get his fingers in the cog-wheels, and to keep his shirt-sleeves rolled up, it was said: No duty rests upon a master to notify even a minor of the ordinary risks and dangers of his occupation, which the latter actually knows and appreciates, or which are so open and apparent that one of his age and capacity would, under like circumstances by the exercise of ordinary care, know and appreciate. Hence, if the plaintiff had failed to give him proper instructions and cautions, yet if he obtained the same information and cautions from any other source, whether from persons or from his own observation and ex-

¹ Colorado Midland R. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701. ² Woutilla v. Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551.

perience, the negligence of the defendant would not be the proximate cause of the injury. If such a servant is informed of a particular danger and as to the proper precautions to prevent it, it is no justification or excuse for an exposure of his person to that danger, or for a negligent omission of such precautions, that he may not have realized the full magnitude of the injury to himself which was liable to result from such negligence.

It was urged at the trial that he may have forgotten his cautions at the moment of the danger and not realized the full extent of the danger, and might, as he claimed, suppose if caught he could jerk his sleeve out before his arm was drawn in.¹

854. Where an employee undertook the work of white-washing a card room in a factory while the machinery was in motion, it was held that he took the risk of being caught in the machinery. It was said: The dangers were fully open and obvious. He was fully capable of understanding them and must be taken to have comprehended them. To the suggestion that there was a key-way in the end of the shaft which made it more likely to catch his clothing than a plain shaft, it was said: But the key-way was not a defect and the shaft was in the same condition when he was hurt as when he began to whitewash the room. The danger of being caught by contact with the shaft, whether he knew of the key-way or not, was so great and obvious that he must have appreciated and taken upon himself the risk of being caught and injured by coming in contact with the shaft. It was not necessary that he should appreciate every particular of the danger.²

855. Where a brakeman was injured while attempting to couple a baggage-car provided with a Miller platform and coupler to an engine having only the ordinary coupling device, by the coupling devices slipping by each other, causing him to be crushed between the cars, and it appeared that

¹Truntle v. North Star Woolen Mills Co., 57 Minn. 52, 58 N. W. 832. ²Connolly v. Hamilton Woolen Co., 163 Mass. 156, 39 N. E. 787.

such conditions were likely to happen under certain circumstances, owing to the lateral motion of the Miller coupler, it was said: In reference to the assumption of the risk of such dangers, where the employee knew the character of the appliances used, it is not enough that the servant knew or ought to have known the actual character and condition of the defective instrumentalities furnished for his use. He must also have understood, or by the exercise of ordinary observation ought to have understood, the risks to which he was exposed by their use. The servant, although a man of ordinary prudence as well as experience, may be quite incapable of appreciating the degree of risk involved in the use of certain kind of machinery, while the master may be, and generally is. While it appears the plaintiff knew the character of these two couplers, that one was a Miller and the other a common one, and that the former had a certain amount of lateral motion, and that there was no goose-neck or wooden buffers on the tender, and assuming that he must be held to the ordinary skill and experience of brakemen, it does not appear, certainly conclusively, that he, by the exercise of ordinary observation, ought to have understood the risks to which he was exposed by using such couplers.¹

856. It was held that a brakeman with about a week's experience did not assume the risk of danger incident to the use of a goose-neck coupling device upon a passenger engine, being used at the particular time in hauling freight cars, it appearing that such a device is more than ordinarily dangerous when used in connection with freight cars having the ordinary coupling device, where it did not appear he had experience in the use of such a device, and did not know that it was being used at the time. It was intimated that had he known that it was being used, it would not as a matter of law charge him with an assumption of the risk, as he might not have known the extent of the risk and danger he was subjected to by its use.²

¹ Russell v. Minneapolis & St. Louis R. Co., 32 Minn. 230.

² Hungerford v. C., M. & St. P. R. Co., 41 Minn. 444.

857. Where an employee was engaged in assisting to turn an engine upon a turn-table with the aid of another engine, a stick being placed between them which he held, and as the force was applied the engine upon the table was forced off, the stick breaking causing him injury; and it appeared he had been accustomed to do this work and that no accident had before occurred, it was said: In reference to the question of his assumption of the risk, the plaintiff might assume, unless the danger was patent, that the proper officer understood the nature of the business and approved the method of operating the table which was adopted, and was in a better position to understand the risks. The situation may be such that while the character of machinery and its mode of operation may be sufficiently obvious to the senses, yet the risks attending its use may not be appreciated or understood by the employee without proper explanation or warning. It is the duty of the servant to use reasonable care to inform himself in respect to the hazards to which he may be exposed, but unless the risks are patent he is not under the same obligation to know the nature and extent thereof as the master. Upon the evidence the court was not warranted in conclusively presuming that the plaintiff knew or was bound to know the hazards of his position or that any such accident was likely to happen. This was a question for the jury.¹

858. It was held that whether an employee, an ordinary laborer, appreciated the risk of injury from a rapidly revolving shaft upon which was a set-screw, though he knew of the shaft and was injured while stepping over it, was properly a question for the jury.²

G. Loaded Cars.

859. An employee assumes the risk from the manner in which cars are loaded. The presumption is they are loaded by his fellow-servants. If injured, it cannot be claimed that

¹ McDonald v. C., St. P., M. & O. R. Co., 41 Minn. 439.

² Roth v. Northern Pacific Lumbering Co., 18 Oreg. 205, 22 Pac. 842.

it was caused by an unsafe appliance, but rather the improper use of safe appliances.¹

860. The business of a brakeman is beset with many dangers which are incident to the business, and the risks arising from cars loaded with projecting timbers and rails are risks incident to this particular business, and as to that business is not extraordinary.²

861. It was first said by the Michigan court that it is as much the personal duty of the master to see that cars are so loaded that brakemen will have reasonably safe access to the brakes, and an opportunity for the safe discharge of their duties, as it is to see that proper appliances are provided.³

862. That it did not alter the rule that the car had been received from another company.⁴

863. The latter case was reversed on rehearing, and it was said: Where a railroad company has employed a competent inspector to inspect all cars received by it and see that they are properly loaded, it cannot be held liable to a brakeman, who, in coupling such cars to others, is injured by reason of timber being so loaded as to project over the end of the car.⁵

864. Where an employee was injured while coupling cars by reason of logs being so loaded thereon as to project beyond the ends of the cars, and it appeared he had been cautioned as to coupling cars so loaded, and had been provided with a rule of the company calling attention to the

¹ Indianapolis & St. L. R. Co. v. Shean (Tex.), 18 S. W. 151; Jacksonville, T. & K. W. R. Co. v. Galvin, 29 Fla. 636, 11 So. 231; Scott v. Oregon Ry. & Nav. Co., 14 Oreg. 211, 13 Pac. 98.

² Jackson v. Missouri Pac. R. Co., 104 Mo. 448; Northern Central R. Co. v. Hussen, 101 Pa. St. 1; Boyle v. N. Y. & N. E. R. Co., 151 Mass. 102; Toledo, W. & W. R. Co. v. Black, 88 Ill. 112; Day v. Toledo, C. S. & D. R. Co., 42 Mich. 523; Railroad Co. v. Gower, 1 Pickle (Tenn.), 465; Mexican Central R. Co. v.

³ Irvine v. Flint & P. M. R. Co., 89 Mich. 416, 50 N. W. 1008.

⁴ Dewey v. Detroit, G. H. & M. R. Co., 97 Mich. 329, 52 N. W. 942.

⁵ Dewey v. Detroit, G. H. & M. R. Co., 97 Mich. 329, 56 N. W. 756.

fact that logs often projected over the ends of the cars, and forbidding coupling by hand, it was held the company was not liable; that it was a risk assumed.¹

865. Where an engineer was struck while in his cab by a limb of a tree on a car of a passing train, and it appeared that a rule of the company made it the duty of the conductors to see that the cars were properly loaded, it was held that the fault, if any, was that of the conductor, his fellow-servant.²

866. Where an employee was injured by reason of lumber being loaded upon a car by a shipper in such a manner as to prevent the working of the brakes by an employee, and it appeared by defendant's rules that it was the duty of station agents to either inspect the cars or have some one else do so before they were taken out, and it further appeared such inspection would have discovered the improper manner in which the car was loaded, it was held that, the defendant having provided a safe car and a system and competent men for its inspection, it was not liable.³

867. Where a switchman in defendant's employ was injured by timber falling from a passing car employed by the defendant in its business, as the result of improper loading by other employees of the defendant, it was held that, as they were his fellow-servants, the defendant was not liable.⁴

868. Upon a subsequent appeal the defendant was held liable upon the ground of not having established proper rules prescribing the manner in which cars should be loaded with lumber.⁵

869. Where a switchman was injured in the attempt to couple cars loaded with bridge timbers, the ends of which projected beyond the ends of the cars, so as to make the act of coupling dangerous, of which he had no actual notice, it

¹ Brennan, Adm'x, v. Mich. Cent. R. Co., 93 Mich. 156, 53 N. W. 358. ⁴ Ford, Adm'x, v. L. S. & M. S. R. Co., 117 N. Y. 638.

² Jarman v. C. & G. T. R. R. Co., 98 Mich. 135, 57 N. W. 32. ⁵ Ford v. L. S. & M. S. R. Co., 124 N. Y. 493.

³ Byrnes v. N. Y., L. E. & W. R. Co., 113 N. Y. 251.

was held a proper question for the jury whether the plaintiff, by the exercise of proper diligence, could or could not have discovered the projecting timbers in time to have avoided the danger. The important question, whether the manner of loading cars was chargeable to the master or was a duty relating to the use of an appliance, was not discussed.¹

870. It was said that where a railroad company is in the habit of receiving from other railroads, cars loaded with timber which projects over the ends of the cars so as to make it dangerous for any one except a careful, skilful and prudent person to attempt to couple the cars together, it is not negligence for the railroad company to order and permit such a person, who has been in the employ of the company doing that kind of work for about five months, to attempt to make such coupling, where the attempt is to be made in broad daylight, although it may be raining at the time.²

871. Yet where a brakeman was injured by a smoke-stack, loaded upon a car, shoving forward, and it was urged that the railroad company was negligent in the manner of such loading, it was held that those servants whose duties required them to attend to such matters represented the master. It was said by the court: "We are unable to see any distinction between the preparation and inspection of the car itself as a fit instrument to be placed in the train, and the preparation and inspection of a loaded car to be placed in the train for transportation."³

872. It was held that a railroad company was responsible for the manner in which cars were loaded with timber which projected over the ends of the cars, and that such risk was not incident to the business which an employee assumed. It should be kept in mind that in Iowa the statute, so far as railroads are concerned, makes such corporations liable for

¹ Northern Pacific R. Co. v. Everett, 152 U. S. 107.

² Atchison, T. & S. F. R. Co. v. Plunkett, 25 Kan. 188.

³ Atchison, T. & S. F. R. Co. v. Seeley, 54 Kan. 21, 37 Pac. 104.

the negligent acts of its servants whose duties require them to load cars.¹

873. Where an employee was injured by the manner in which a car of lumber was loaded, the lumber projecting over the ends of the car, and it appeared that the car was loaded by a lumber firm for shipment, it was held that the company was liable to the same extent as if the car was loaded by its own employees.²

874. Where it appeared that a brakeman knew that the company was accustomed to haul cars loaded with machinery without foot-boards, and it was not shown that it was usual to place such cars where brakemen were required to pass over them, and one such was injured by falling from the car while passing over it upon a sudden call for brakes, it was held it could not be said that he assumed the risk, nor could he be charged with contributory negligence as matter of law.³

874a. Where a brakeman was injured in the attempt to couple a car with rails projecting over the end, and there was evidence that the conductor knew that the car was so loaded and that it was dangerous to employees engaged in coupling, it was held a question for the jury whether the defendant was negligent in hauling the car.⁴

874b. It was held negligence on the part of a railroad company, after its men in charge of a train knew that a car was improperly loaded with iron rails, or the load had shifted so in transit that the ends of the rails projected, to haul the car in that condition in a train; and where a brakeman was found with his head caught between the end of a rail and the end of another car, indicating that after coupling the cars, in backing out, he had raised his head too

¹ Hamilton v. Des Moines Valley R. Co., 36 Iowa, 31.

² Haugh, Adm'r, v. C., R. I. & P. R. Co., 73 Iowa, 66.

³ Hosic v. C., R. I. & P. R. Co., 75 Iowa, 683.

⁴ Corbin v. Winona & St. Peter R. Co. (Minn.), 66 N. W. 271.

Under the Minnesota statute an employee may recover for the negligence of a conductor.

soon, it was a question for the jury whether he was guilty of contributory negligence.¹

874c. Where a brakeman was injured while attempting to couple a car loaded with telegraph poles, the ends of the poles projecting over the end of the car, and it appeared it was in the night-time, but that he had a lantern, it was held that, in the absence of testimony that he had notice of the manner in which the car was loaded, the question of his contributory negligence was for the jury.²

H. *Damaged Cars.*

875. An employee ordinarily assumes the risk from damaged cars which are being transported to the company's yard or repair shops according to the usual custom for the purpose of inspection and repairs. It was said: Cars and engines are frequently damaged, and it becomes necessary to remove them to some proper place for repairs, and it may happen they are so seriously damaged that their removal will be attended with some personal danger to those engaged in the work; yet this is one of the perils of the business. The fact that the car might have been repaired on the track is of no consequence so long as the method as to repairs was otherwise, of which the plaintiff had knowledge.³

876. Where a brakeman knew that the brakes upon a flat-car were out of order, and he attempted to check a slowly moving car by getting on the front end and attempting to press the brake-beam with his foot, which slipped, whereby he was injured, it was held that there was no evidence of negligence on the part of the company, as dam-

¹ Corbin v. Winona & St. P. R. Co. (Minn.), 66 N. W. 271.

In the state where the above case was decided, a statute regulates the liability for neglect of fellow-servants, so the question became one of contributory negligence.

² Atchison, T. & S. F. R. Co. v. Wells, 56 Kan. 222, 42 Pac. 699.

³ Flannagan v. Railway Co., 50 Wis. 462; Same Case, 45 Wis. 98; C. & N. W. R. Co. v. Ward, 61 Ill. 130; Yeaton v. Boston & Lowell R. Co., 135 Mass. 418; Watson v. Railway Co., 58 Tex. 434; McCosker v. Railway Co., 84 N. Y. 77.

aged cars are incident to the business; that the employee attempted a very dangerous act of his own volition and with full knowledge of the danger; that the risk was his.¹

877. When cars have been condemned to the repair shops as disabled, one who knowing that fact calls for the engine to back and goes between them without examining them is negligent; and the fact that the disabled cars might have been left at the shops near the place where they were condemned will not make the company liable to servants injured thereby, the journey having been made in safety and the accident occurring at the destination.²

878. The removal of damaged cars to a shop or repair track is necessarily incident to the business of a railway company, and it is not inconsistent with the proper discharge of its duty as master in providing suitable regulations and arrangements for the transfer of such cars that an employee assisting in such service should through accident, or the error or omission of a fellow-servant, though a foreman, be misled so as to mistake a damaged for a sound car.³

879. One of defendant's flat-cars loaded with lumber having been inspected and found in bad order was removed to a track in defendant's yard, known as the repair track, being that upon which cars were customarily placed for the purpose of repair. A card marked "Bad order" was affixed to it by the inspector, but it does not appear it was on it when it reached the repair track. On the contrary, the evidence tended to show it was not. It became necessary to handle this car in getting others out that had been repaired, and the plaintiff's intestate was one of a crew employed to handle cars upon such track generally, and the particular one in question. Such employee attempted to mount this car, while being kicked in on the track, by stepping on the brake-beam in front and seizing the brake-staff. The brake-staff broke,

¹ *Judkins v. Maine Central R. Co.*, 80 Me. 417.

³ *Fraker v. St. Paul, M. & M. R. Co.*, 32 Minn. 54.

² *Ill. Cent. R. Co. v. Bowles*, 71 Miss. 1003, 15 So. 138.

he fell, and was run over and killed. The brake-staff was defective by reason of a flaw in it. For what purpose the employee desired to mount the car does not appear, nor that there was any necessity for mounting it. There was nothing in the evidence to indicate that such employee had information or knowledge of any particular defect. He knew it was placed there, however, because out of repair.

It was said: The aspect of the case is, the employee is notified generally that the car is in bad order, so that it has been necessary to withdraw it from service and lay it up for repairs. When he comes to handle it he does so knowing that for some reason not disclosed to him it is not suitable for use in the ordinary way. Not knowing what in particular those reasons are, if he handles the car at all he handles it as a car which is unsuitable for use, and at his own risk, not only for its defects, at least for such as are apparent to or would fairly be suggested by ordinarily careful and diligent observation, like those of the brake on this car, but also at the risk of the negligence of his fellow-servant in handling the same.

The plaintiff's intestate must be taken to have assumed the risk of handling this car as one in bad order, which it therefore might be dangerous to handle in the ordinary way, and as to which, in the absence of any definite information as to the respect in which it was defective, the burden of ascertaining the defect and source of danger was cast upon and assumed by him. As he took the risk and burden upon himself he cannot hold the defendant responsible for it.¹

I. *Fear of Discharge.*

880. Fear of discharge by an employee if he does not obey an order of the master will not justify him in running a risk which is well known to him, and then if injured seek a recovery in damages from the master.²

¹ Kelly v. C., St. P., M. & O. R. Co., 35 Minn. 490. Russell v. Tillotson, 140 Mass. 201; Taylor v. Carew Mfg. Co., 140 Mass.

² Haley v. Case, 142 Mass. 316; 150; Leary v. Boston & Albany R.

880a. In the absence of restrictive contract provisions the master is at liberty to discharge the servant at any time; so, likewise, is the servant at liberty to abandon his service at will. The master has the right to demand other service from that which the servant has engaged. The latter may accept or decline at will. Declining, he may lose his employment; accepting, he assumes the risks attending the service, if he knows or has been properly warned of them. The servant is not under guardianship. He is a free man, at liberty to make such contracts as he will. If, through stress of circumstances, he consents to the order of the master rather than be discharged from employment, it does not impose liability upon the master because of such demand, if he has otherwise performed the duty which the law imposes upon him with respect to the servant.¹

881. It was held that a conductor, though acting under the orders of his superior, in moving his train in violation of rules, when he knew that by so doing there was liability of collision with another train, assumed the risk of injury from such source. It was said: If, knowing the service was thus dangerous, he undertook it under the order of his superior, through fear of losing his position if he refused, that would not constitute an excuse.²

882. Where a section foreman alleged that his injury, which was a rupture, was caused by his being compelled to lift, with the aid of only one man, heavy iron rails; that he had objected to performing such labor without more help; that the defendant had told him he could continue to perform such labor or throw up his job, and he continued from fear of discharge, it was held that, as he continued the employment with full knowledge of the danger, he assumed the risk, and that fear of discharge would not alter the rule, nor would his simply protesting.³

Co., 139 Mass. 580; Moulton v. Gage, 138 Mass. 390; Williams v. Churchill, 137 Mass. 243; Linch v. Sagamore Mfg. Co., 143 Mass. 206.

¹ Reed v. Stockmeyer, 74 Fed. 186.

² Wescott v. N. Y. & N. E. R. Co., 153 Mass. 460.

³ Atchison, T. & S. F. R. Co. v.

883. Where an employee objected to doing certain work on account of not understanding it, and he was not physically strong enough to perform it, and was told to "either go there or get out," it was said: Such direction does not obviate the objection to the plaintiff's right to recover. If an employee of full age and ordinary intelligence, upon being required by his employer to perform duties more dangerous or complicated than those embraced in his original hiring, undertakes the same knowing their dangerous character, although unwillingly from fear of losing his employment, and is injured by reason of his ignorance and inexperience, he cannot maintain an action therefor against his employer.¹

884. The Indiana court seems to hold that fear of discharge is a sufficient excuse in obeying an order known to be dangerous, and that the servant will not, under such circumstances, have assumed the risks.²

885. It was said that while in theory the employee whose master furnishes appliances which both know are defective is at liberty to quit the service and refuse to be subjected to the enhanced danger, we cannot close our eyes to the fact that the necessities of the struggle for existence tend strongly to deprive the employee of that theoretical independence and freedom of action. While the service cannot be compulsory, in the sense that the employee can be compelled to work against his will, yet the very nature of the relation existing between the parties carries with it the irresistible inference of dependence upon one side. . . . The servant does not stand upon the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed.³

Schroeder, 47 Kan. 315, 27 Pac. 965.
See, also, *Railway Co. v. Drew*, 59
Tex. 10.

² *Pittsburg, C. & St. L. R. Co. v. Adams*, 105 Ind. 151.

³ *Brazil Block Coal Co. v. Hood-*

¹ *Dougherty v. West Superior L. & S. Co.*, 88 Wis. 343.
et, 129 Ind. 327.

J. Haste; Attention Diverted.

886. Where it was urged that the employee, injured by contact with a low bridge, was engrossed with his duties and failed to observe his peril, it was said there was no weight in the suggestion. There was nothing unusual in the act. It was a part of the ordinary duty of a brakeman to perform it. As to the pretext that the call upon the plaintiff to perform the service was sudden and that he was thrown off his guard, it is certainly a conclusive answer to say that it was a part of his bargain when he undertook the business that he subjected himself to the risk of such emergencies.¹

887. Where an employee was injured by contact with a low bridge, in reply to the suggestion that the attention of employees might be diverted by other duties, and thus not be wanting in proper care, it was said: We do not rest our decision on this ground. In the midst of preoccupation with his duties he might be excusable for losing sight of the danger menacing him at the moment. But this peril was one incidental to the employment, in contemplation at the time of the contract, and arising from causes open and obvious, the dangerous character of which he assumed.²

888. Where a section foreman was injured by an engine moving upon him in the defendant's yard, and it was claimed that the negligence of the defendant in leaving logs at the side of the track, upon which he stumbled in the attempt to get out of the way of the engine, was the cause of his injury, and his knowledge of such condition being urged against his right of recovery, to the argument that he might not be assumed to have always kept it in mind, that in the hurry of the moment, and perhaps temporary confusion of mind, caused by the necessity of at once getting out of the way, he might forget the danger from the pile of logs, it was said: But this was one of the things the risk of which he assumed.³

¹ *Baylor v. Del., L. & W. R. Co.*,
40 N. J. L. 23.

³ *Bengtston v. C., St. P., M., etc.
R. Co.*, 47 Minn. 486, 50 N. W. 531.

² *Baltimore & Ohio R. Co. v.
Stricker*, 51 Md. 47.

889. Where an employee was passing through an alley in a mill where machines were in operation with uncovered gearing, and, hearing an outcry, dropped one of his hands, which was caught in the gearing and injured, it was said: Nothing appeared that would call upon the defendant to have given him instructions. The accident was not caused by want of instruction, but by the plaintiff's attention being diverted by an outcry for which the defendant was in no way responsible.¹

890. Where a brakeman was injured while on a car by collision with the spout of a water-tank, negligence on the part of the company as to the location of the spout seems to have been assumed. It was said: If the service to be performed by such employee was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect or be prepared at all times to avoid it.²

891. Yet in a later case, after the distinction between assumed risk and contributory negligence became more pronounced, where the court had held that an employee, having knowledge of a structure near the track, waived any neglect on the part of the company in placing it there, it was said: This waiver cannot be affected by the particular situation he may be placed in, or the rapidity or promptness with which he may be required to act at the time of the accident. These questions may very properly bear upon the question of contributory negligence of the employee, but can have no bearing upon the question whether the defendant has been guilty of negligence about which the employee has a right to complain.³

892. An instruction which stated in substance that if the service was of such a character as to require the exclusive attention of the servant to be fixed upon it, and that he

¹ *Cheney v. Middlesex Co.*, 161 Mass. 296.

² *Perigo v. C., R. I. & P. R. Co.*, 52 Iowa, 276; *Same Case*, 55 Iowa,

³ *Greenleaf, Adm'r, v. Dubuque*, etc. R. Co., 33 Iowa, 52.

should act with rapidity and promptness, the law does not require that he should always bear in mind the nature, kind and character of such appliances, or be prepared at all times to avoid it, was held to be correct. But the court refused to apply the doctrine to one engaged in coupling cars having different devices, one a Miller hook coupling and the other a Potter hook coupling, where the defect alleged consisted of the use of the two in connection. It was said: There was no sudden danger, no emergency. The danger that surrounded the employee at the time of his death was the danger incident to the act of coupling cars—a danger which was ever present when he was engaged in the performance of that duty.¹

893. Where a brakeman was killed by contact with a low bridge, and it was alleged that the cause of the injury was a defect in the brakes, whereby they would not stop the train as quickly as if they were in good condition, and that in the attempt to stop the train by the use of such brakes, owing to the darkness and his being busily engaged with such duty he failed to observe the bridge, it was held that the declaration stated a good cause of action.

That the distinction between the case of *Clark v. Railroad Co.*, 78 Va. 709, and the present case, was that there the attention of the employee was not diverted by his duties or otherwise.²

894. Where a switchman was injured in the railroad company's yard while performing his duties, in stepping upon an adjacent track, where a train ran over him, it was held that it could not be said as matter of law that he was guilty of such contributory negligence as would defeat a recovery; that the jury had a right to consider that he was necessarily engrossed in the attention he was giving to his duties. The doctrine of assumption of risk was ignored.³

¹ *Martin v. California Central R. etc. R. Co.*, 90 Va. 351, 18 S. E. Co., 94 Cal. 326. See, also, *Wallace* 559.

v. C. V. R. Co., 138 N. Y. 302.

³ *Bluedorn v. Missouri Pac. R. Co.*,

² *Beard's Adm'r v. Chesapeake*, 108 Mo. 439, 18 S. W. 1103.

895. Where a brakeman was injured while in the act of coupling cars on a side-track in the night-time, by stepping into an uncovered trench across the track, which he knew was there, it was held that the question of defendant's negligence was for the jury.

The opinion seems to hold that the plaintiff's knowledge of the existence of the trench was not sufficient under the circumstances to charge him with contributory negligence, as the act in which he was engaged necessarily required his whole attention and thought, and that the act of coupling cars while in motion was not negligence, as it can scarcely be done otherwise.¹

896. Where it was contended that an employee assumed the risk of coupling by reason of his knowledge of the character and condition of the draw-bar of the engine, and it appeared that he was directed by his superior to make the coupling, knowing that a passenger-train would be due in a few moments, it was said: Under such circumstances, in using this pilot-bar and in attempting to make the coupling, he did not waive his right of action for the injury received. He would not be justified in disobedience of orders at such a critical moment.²

897. Where an inexperienced brakeman was injured while making the attempt to couple a car to a caboose, the draw-bars being of unequal height, which rendered the act very dangerous if attempted with a straight link, and it appeared he did not know that the act required the use of a crooked link and he used the former, it was said that a recovery would not be defeated on the ground that the defect was obvious, where he was compelled to act with haste. The decision seems to be ruled by the doctrine of contributory negligence, as the court state whether he used due care and diligence in coupling the cars was a question for the jury in view of the circumstances.³

¹ *Plank, Adm'x, v. N. Y. C. & H. R. Co.*, 60 N. Y. 607. But see *De-Forrest v. Jewett*, 88 N. Y. 264.

² *Strong v. Iowa Central R. Co. (Iowa)*, 62 N. W. 799.

³ *St. Louis, I. M. & S. R. Co. v.*

K. Reliance upon Master.

898. The rule stated that if the master or his representative has superior knowledge of a given situation and its safety, or the contrary, and he assures the servant that he can safely undertake a given work, such assurance may justify the servant in undertaking the work, in reliance upon the superior knowledge of the master, without being liable to the charge of negligence in so doing, unless the danger is imminent or manifest so as to prevent a reasonably prudent man from risking it.

This rule was applied where a laborer was injured while shoveling dirt where there was an overhanging bank, and was assured by the foreman who had inspected it that the bank would hold and the place was safe.¹

899. It was said: Master and servant do not stand upon an equal footing even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior skill of the master and is not entirely free to act upon his own suspicions of danger. If a servant being ordered into a place of danger obeys and is injured, he will not be held to be guilty of contributory negligence, unless the danger is so glaring that a reasonably prudent person would not have entered into it.

The facts were that an employee of a city was directed by the city engineer to go into a trench excavated by the city and remove some supports to an arch, which being done the arch fell and injured him. He was assured by such engineer that it was safe to do the work.²

900. Where a day laborer was ordered by the street commissioner of a city to remove certain blocks lying near a bent of a bridge, which bent had been prepared in the forenoon and left insecure by reason of a lack of braces and

Higgins, 53 Ark. 458, 14 S. W. 653.

¹ Haas v. Balch et al., 56 Fed. 984 (C. C. A.).

See same subject under CONTRIBUTORY NEGLIGENCE.

² Shortel v. City of St. Joseph, 104 Mo. 114.

supports so that it was liable to fall at any time, and in the afternoon, while doing such work, he put his hands upon the bent of the bridge and it fell, causing him injury, upon demurrer it was said: Conceding that in going to work upon the bridge in the afternoon he impliedly assumed all the ordinary risks incident to such employment so far as those risks were known to him or could have been discovered in the exercise of ordinary care, the court could not say he was negligent in obeying the order of the master. Assuming that the unsafe and dangerous condition of the bent was the result of the negligence of his fellow-servants, he did not, in obedience to the command of his master, assume the risk, unless the danger was so great that a man of ordinary prudence would not have taken the risk. He was not required on that occasion to make a special examination or critical investigation to ascertain whether the bent had been carefully or negligently raised, or whether it was then in an unsafe or dangerous position, before obeying the command of the master. When directed to do the act in the performance of which he was injured, he had the right to assume that the street commissioner, with his superior knowledge of the facts, would not expose him to unnecessary perils. Assuming that the street commissioner was a fellow-servant in the work of placing and leaving the bent in the alleged unsafe and dangerous condition before noon, he was the master in giving the command after noon in the execution of which the employee was injured.¹

901. An employee was injured by the caving in of the sides of a trench about nine feet deep, in which he was working calking water-pipes. He was a man of mature years and of ordinary intelligence and of considerable experience in that kind of work, and knew that trenches of that depth were liable to cave in. The trench had partly caved in a few feet away about ten minutes before, and plaintiff, with others, had left the work, but he had returned upon being told to go back by defendant's superintendent,

¹ *City of Lebanon v. McCoy*, 12 Ind. App. 500, 40 N. E. 700.

who said the ditch was perfectly safe and promised to buy some lumber and have it braced up. It was held that, notwithstanding such direction and such assurances of safety, the plaintiff, having full knowledge of the danger, assumed the risk when he chose to continue his work.¹

902. It was said that a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound at his peril to set his own judgment above that of his superior. This was said where an employee, at the command of his foreman, left his regular work and operated a cut-off saw, which proved to be dangerous by reason of the rope which controlled the saw being worn and defective.²

903. It is the primary duty of the servant to obey the orders of his master within the scope of his employment; and when the work ordered to be done is not obviously dangerous, or of such a nature that it cannot be performed with safety, or about which there can be a difference of opinion in the minds of reasonable and prudent persons, then the servant is not, at the peril of being discharged, bound to set up his judgment against that of the master. The servant has a right to rely upon it that the master has taken reasonable precaution for his safety under such circumstances that the work may be done without extra hazard or peril to himself. This was said and applied where the cause of injury was alleged to be insufficient light in the place where an employee was engaged at work in removing machinery.³

904. Where an engineer was injured by the overturning of his engine owing to the bad condition of the track, and it appeared he knew that it was somewhat out of repair, and that he incurred some danger in running his engine, but did not know how badly it was out of repair or that the

¹ Showalter v. Fairbanks, Morse & Co., 88 Wis. 376. Works v. Randall, 100 Ind. 293; Rogers v. Overton, 87 Ind. 410.

² Indiana Car Co. v. Parker, 100 Ind. 181, citing Atlas Engine R. Co., 7 Utah, 523, 27 Pac. 728. ³ Harrison v. Denver & R. G. W.

danger was very great, that he and other engineers had frequently run their engines over it with safety, and the officers deemed it practically safe, it was held that the question of the assumption of the risk was properly for the jury. It was said that the plaintiff had the right to rely upon the judgment of such officers.¹

905. It was said in reference to a workman in a mine that it is not contributory negligence for an employee, who is in doubt about the safety of the place where he has to work, to defer to the opinion and assurances of those who are supposed to know, and from their position are bound to have special knowledge as to whether it is safe or not.²

905a. Where an employee working in a mine was injured by a large piece of loose rock falling upon him, evidence that the superintendent knew of this loose stone before he directed such employee to work there, and that he made an unsuccessful attempt to dislodge it, was held sufficient to warrant a jury in finding the superintendent negligent.³

906. It was held a question for the jury whether an employee assumed the risk by using ladders tied together by the employer, in going upon the roof of a building, where the rope became untied, permitting the ladder to fall with such employee, thus causing him injury. It was said: The jury would have been warranted in finding that the plaintiff knew and appreciated the danger, and also that the proximate cause of the injury was the act of plaintiff in moving the ladder. Also they might be justified in finding that the plaintiff might reasonably have relied upon the assurance of the employer that it was safe, as he was an old sailor and possessed skill in tying knots.⁴

907. Where a master directed his servant to work in a certain dangerous place, and, in reply to the servant's expressions of fear, assured him that there was no danger, it

¹Hawley v. Northern Central R. Co., 82 N. Y. 370.

²Lake Superior Iron Co. v. Erickson, Adm'x, 39 Mich. 492.

³Burgess v. Davis Sulphur Ore Co., 165 Mass. 71.

⁴Denning v. Gould, 157 Mass. 563.

was said: The servant was not guilty of negligence in going to work there, unless the danger was so imminent that no prudent person would undertake to perform it.¹

908. It was said: This court has perhaps recognized that the servant may put some reliance upon the master when he assumes control of the work, and that there is not precisely the same obligation resting upon each to ascertain what the dangers are (citing *Coombs v. New Bedford Cordage Co.*, 102 Mass. 585); and when the master undertakes to direct specifically the performance of work in a particular manner, we cannot say, as matter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the vigilance which otherwise would be incumbent upon him. It was held that where an experienced driver was directed by his employer to drive under a gateway and then back his van, he never having driven under it before, and their relative positions were such that the employer had better means of observation than the servant, whose attention was devoted chiefly to the management of the horses, and he was injured by contact with a sign over such gateway, that an action against the employer could be maintained.²

909. Where it appeared a carpenter was called to assist in loading car wheels upon cars by means of a "jigger" which was worn and defective, he not having experience in such work, it was said: Had not the plaintiff the right to rely somewhat, and if so, to what extent, on the experience of the foreman, or even on that of his associates.³

910. Where a servant, an all-around workman, was called by his employer to witness the testing of a boiler, but taking no part in the operation, and he was injured by the boiler bursting under the test, it was said: A servant, an all-around workman subject to the orders and directions of the master, whenever he is called upon to work pursuant to

¹ *Chicago-Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572.

² *Haley v. Case*, 142 Mass. 316.

³ *Kain v. Smith*, 89 N. Y. 375.

conditions created by the master has the right to assume superior knowledge, judgment and skill in the master under whose orders he is immediately acting, and to believe that he will be protected from danger.¹

911. Where it was contended that the curve, upon a branch at or near its intersection with the main track, was so short as to be dangerous, and a conductor, with full knowledge of its condition, was injured by means thereof, it was held that it could not be said as matter of law that he assumed the risk.

The rule was stated to be: If the instrumentality by which the servant is required to perform the service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such a case the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he otherwise would be entitled. But where the servant, in obedience to the requirements of the master, incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution and skill, the rule is different. In such a case the master is liable for a resulting accident.

The conclusion was drawn that a man of common prudence might conclude that this train, as others had before, might pass over the curve in safety. The conductor might properly rest upon the judgment of his superiors.²

912. An employee in a mine was killed by the caving in or falling of portions of the walls. For twelve hours previous to the caving, the usual and unmistakable indications thereof appeared. The employees, including the plaintiff,

¹ Helm v. O'Rourke, 46 La. Ann. Pa. St. 276, where the rule is qualified to the extent that the master is not responsible for those dangers to which the servant voluntarily

² Patterson v. Pittsburg, etc. R. Co., 76 Pa. St. 389. See, however, Pittsburg R. Co. v. Sentmeyer, 92

subjects himself, though he does so without carelessness or breach of duty.

realized the danger; made complaint to the boss, who told them in substance that there was no danger of a cave-in there that night, to go back to their work, and he would be there shortly, but delayed for two hours, at the end of which time the cave-in occurred which injured the plaintiff's intestate. In the meantime, however, the men did no work. They had all the knowledge of the impending danger that any one could have, both as to time and effect. It was said by a bare majority of the court: "Employees in entering into a hazardous employment take the ordinary risks attending that service; but when servants complain of what appears to them to be an impending peril in a position to which they have been ordered, and they notify the master of the danger and ask to be relieved, the master cannot refuse to relieve them, insist upon their continuing the work in that position, and when they remain at his direction, waiting for an inspection which he has promised but neglected to make, relying upon his promise and superior judgment, and fearing the consequence of disobedience, and are injured, be then allowed to say: 'You were guilty of contributory negligence in doing what I directed to do,' or 'You assumed that risk when you entered my employment.' Under such circumstances employees cannot be said to have heedlessly or voluntarily assumed the risk."¹

913. Missouri rule.—The Missouri court, following *Patterson v. Railway Co.*, 76 Pa. St. 389, held that where the superior, who has control of and direction over the servant, orders him to do a particular act which is extrahazardous and dangerous, and the servant obeys and is injured, he may recover of the master, unless to obey is plainly to imperil life or limb; and this upon the ground that the act of command given by such superior is the act of the master.²

¹Schlacker, *Adm'x, v. Ashland Kansas City, St. J. & C. B. R. Co., Iron Min. Co.*, 89 Mich. 253. 115 Mo. 205; *Huhn v. Missouri Pac.*

²*Stephens v. H. & St. J. R. Co.*, 86 Mo. 221; *Soeder v. St. L., I. M. & S. R. Co.*, 100 Mo. 673; *O'Mellia v. Rich Hill Min. Co.*, 108 Mo. 364.

914. Subsequently it was said: A servant is not bound under all circumstances and at all hazards to obey the orders of the master. He cannot recover damages of the master for injuries received while obeying the latter's orders if he had time to deliberate and voluntarily, and with knowledge of the peril, placed himself in a position in which he was more than likely to be injured.

This was said where it was alleged that a section-hand was injured in obeying the order of the section foreman to remove a hand-car from in front of an approaching train.¹

915. Where a hook, which had been used for more than a year connecting a cable with a car used in the shaft of a mine, became displaced in some manner not explained, the hook being in plain sight of the men operating the mine, and such operatives had gone up and down in the car and worked every day in the mine exposed to any danger which might arise from the failure of the hook to perform its proper work, and none of them ever complained of it as inadequate, and the inference follows that none of them believed it unsafe, it was said: They were certainly just as capable of judging of its safety and adequacy as the defendants. Under such circumstances can the defendants be charged with negligence? Were they bound to know more than any one else? Ought they to have perceived danger that was not visible to any one else, and which those whose lives were most exposed were not sufficiently wise or vigilant to foresee?²

L. Burden of Proof.

916. California.—It is not necessary in California for the plaintiff to aver or prove that he himself was without fault or that he did not have knowledge of the defect in the appliances.³

¹ *McDermott v. H. & St. J. R. Co.*, 87 Mo. 285. See, also, *Fugler v. Bothe*, 117 Mo. 475.

² *Burke, Adm'r, v. Witherbee et al.*, 98 N. Y. 562.

³ *Magge v. N. P. C. R. Co.*, 78 Cal. 430; *Robinson v. Western Pac. R. Co.*, 48 Cal. 409; *McQuilken v. Central Pac. R. Co.*, 50 Cal. 7.

917. The burden is upon the defendant to show that the employee either knew or should have known of the defects in or condition of the appliances.¹

917a. Idaho.— Before the servant can recover he must show that the injury did not arise from a defect obvious to himself or which in the exercise of ordinary care he might have known. He must show it was not from a hazard incident to the business.²

918. Indiana.— It is incumbent upon the plaintiff to negative in his complaint knowledge on his part of the unskillfulness or incompetency of fellow-servants, where the gravamen of his complaint is the employment or retention of such by the master. He must also negative knowledge on his part of the want of safety or defective condition of appliances which he alleges are the cause of his injuries.³

919. An averment that the plaintiff was free from fault does not take the place of averments showing that the risk was not voluntarily assumed as an incident of his service.⁴

920. It is not necessary, however, to aver in the complaint facts showing affirmatively that the employee has no means of ascertaining the defect. It is sufficient to aver he had no knowledge of such defect.⁵

921. Iowa.— The burden is upon the defendant to prove that the plaintiff had knowledge of the danger to which he was exposed. It is an affirmative defense. When the defendant shows that the plaintiff knew of the dangerous condition of the road or machinery, which he aided to operate, it is then incumbent upon the plaintiff to show that he was in some manner justifiable in exposing himself to the danger.⁶

¹ *Alexander v. Central L. & M. Co.*, 104 Cal. 532; *Bjorman v. Fort Bragg Red Wood Co.*, 104 Cal. 626. *A. & C. R. Co. v. Sandford*, 117 Ind. 265; *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 156.

² *Minty v. Union Pac. R. Co.*, 21 Pac. 660. ⁴ *Louisville, N. A. & C. R. Co. v. Corps*, 124 Ind. 427.

³ *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75; *Atlas Engine Works v. Randall*, 100 Ind. 293. ⁵ *Ohio & Miss. R. Co. v. Percy*, Adm'x, 128 Ind. 197.

Louisville, N. A. & C. R. Co. v. Corps, 124 Ind. 427; *Louisville, N. A. & C. R. & N. R. Co.*, 62 Iowa, 486. ⁶ *Coates, Adm'x, v. Burlington*, C. R. & N. R. Co., 62 Iowa, 486.

922. If a railroad company wishes to avail itself of the fact that an employee waived its negligence by remaining in its employ with knowledge of the defects, and without objection and without promise of their being remedied, it must plead such facts as a defense, and establish them affirmatively by evidence, and it is not incumbent upon the plaintiff to negative them in the first instance.¹

922a. Kentucky.—The averment of want of knowledge of the dangerous condition of premises or appliances upon the part of an injured servant is necessary to the statement of a cause of action. The question of knowledge is distinct from that of contributory negligence. The reasoning of the court is, that this results from the rule that the master is not an insurer of the safety of the servant, nor a guarantor that the appliances are absolutely safe, and that such conditions as are known to the servant he assumes the risk of.²

923. Louisiana.—The burden of proof is upon the defendant to prove that the employee knew of the danger, and notwithstanding exposed himself willingly and deliberately to it.³

924. Michigan.—Knowledge on the part of an employee of the existence of defects in appliances was held to be matter of defense.⁴

925. Missouri.—The rule in this state is substantially the same as in Iowa. The burden is on the defendant to plead and prove knowledge on the part of the plaintiff of defects in appliances causing him injury.⁵

926. North Carolina.—Whenever a servant, whose conduct has been blameless, sustains an injury by reason of an implement put into his hands by the master or his agents to be used in the prosecution of his work, a responsibility

¹ Mayes, Adm'r, v. C., R. I. & P. R. Co., 63 Iowa, 562.

⁴ Swoboda v. Ward, 40 Mich. 420.

² Bogenschutz v. Smith, 84 Ky. 330, 1 S. W. 578.

⁵ Thorpe v. Missouri Pac. R. Co., 89 Mo. 650; Young v. Shickle H. & H. Iron Co., 103 Mo. 324.

³ Myhan v. Louisiana, E. L. & P. R. Co., 41 La. Ann. 964, 6 So. 799.

must attach to the master. It is true he may free himself of this responsibility by showing that he has at all times been diligent and circumspect as well in the choice of his associates as in the selection and preservation of the implements to be used by him.¹

927. It was held that where the allegation is that a party has been negligent and careless in respect to a matter wherein he is bound to care and diligence, the necessary and legal implication is that he knew, or by reasonable diligence might have known, of the material defects and imperfections that gave rise to the injury complained of.²

928. Ohio.—In an action by a servant against the master for injury resulting from the negligence of the latter in furnishing appliances or in caring for the premises where the work is done, the plaintiff must aver want of knowledge on his part of the defects causing the injury, or that, having such knowledge, he informed the master and continued in his employment upon a promise, express or implied, to remedy the defects; an averment that the injury occurred without fault on his part is not sufficient.³

929. Oregon.—While the burden of proof is on the plaintiff to show that the appliance was defective, and that the master had notice thereof, or knowledge, or ought to have had, the burden of proof is on the defendant to show that the servant did know the defect, and that his negligence has contributed to the injury.⁴

930. South Carolina.—Knowledge on the part of a servant of the defects which caused him injury is a matter of defense. It constitutes no part of the plaintiff's cause of action. The court classes knowledge as contributory negligence, as they say, "But this is upon the ground that he has by his own negligence contributed to the injury of which

¹Cowles v. Richmond & D. R. Co., 84 N. C. 309.

²Warner v. Western N. C. R. Co., 94 N. C. 250.

³Coal & Car Co. v. Norman, 49 Ohio St. 598.

⁴Johnston v. Oregon S. L. & U. N. R. Co., 23 Ore. 94, 31 Pac. 283.

he complains, and it is well settled, in this state at least, that contributory negligence is an affirmative defense."¹

931. United States.—Evidence that plaintiff knew of the defect which caused the injury and assumed the risk is inadmissible when defendant fails to plead such facts.²

932. Virginia.—The servant must use ordinary care to avoid injuries to himself, and to entitle him to recover for the defects in the appliances he is ordinarily required to show (1) that the appliance in question was defective; (2) that the employer knew or ought to have known of the defect; and (3) that the employee did not know of it. The general rule undoubtedly is, that the plaintiff need not aver and prove that he was guilty of contributory negligence. In a case like the present, however, the rule is different, for the reason that he must prove, and therefore must aver, that the injury complained of did not result from the ordinary hazards of the business which he is presumed to have voluntarily assumed, nor from his own fault, but from a cause which brings the case within the exception to the general rule which exempts the employer from liability to the employee for injuries received by the latter in the course of his employment.³

932a. It is unnecessary in the declaration on the part of the employee to allege his ignorance of the danger to which he was exposed. It was stated the master is exempt from liability where the danger is known to the servant, which is but another form of stating that the plaintiff cannot recover for injuries to which his own negligence has contributed. This is true, but contributory negligence is matter of defense and need not be negated by the plaintiff in his declaration.⁴

933. When, however, the servant shows that his injuries were in consequence of an increased risk not incident to his

¹ *Carter v. Oliver Oil Co.*, 34 S. C. 211; *Donahue v. Railroad Co.*, 32 S. C. 299.

³ *Norfolk & W. R. Co. v. Jackson's Adm'r*, 85 Va. 489, 8 S. E. 370.

⁴ *Richmond Granite Co. v. Bailey*

² *Oregon Short Line & U. N. R. Co. v. Tracy*, 66 Fed. 931. (Va.), 24 S. E. 232.

ordinary employment, but growing out of the master's negligence, the burden of proof is on the master to show that the servant understood the increased dangers.¹

934. West Virginia.—A servant who seeks to recover for an injury which he claims resulted from defective machinery or appliances takes upon himself the burden of establishing negligence on the part of the master, and due care on his part, and to entitle him to recover he must overcome two presumptions: (1) That the master has discharged his duty to him by providing suitable machinery and appliances for the business and in keeping them in condition, and (2) that he assumed all the usual and ordinary hazards of the business. Such servant takes upon himself the burden of showing that the master had notice of the defects complained of, or in the exercise of that ordinary care which he is bound to observe, he would have known of, and that the servant was ignorant of, such defect, and had not equal means of knowledge.²

935. Wisconsin.—Knowledge on the part of an employee of the existence of defects in appliances was held to be matter of defense.³

936. In an action by an employee against a railroad company for personal injuries, where the plaintiff's right of action depends upon his ignorance of certain conditions, as defects in a switch-engine and unskilfulness of the engineer, the complaint need not aver such ignorance, but it is for the defendant to aver and prove knowledge on the part of the plaintiff.⁴

937. The employee is only presumed to assume the dangers usually attendant upon his employment; and when he shows that he has been injured by a cause or danger not

¹Norfolk & W. R. Co. v. Ward, 90 Va. 687, 19 S. E. 849. port News & M. V. Co., 33 W. Va. 135.

²Johnson v. Chesapeake & O. R. Co., 36 W. Va. 73, 14 S. E. 432. See, also, Hoffman v. Dickinson, 31 W. Va. 142; Berns v. Gas Coal Co., 27 W. Va. 288; Humphreys v. New-

³Hulehan v. G. B., W. & St. P. R. Co., 68 Wis. 520.

⁴Cole v. Chicago & N. W. R. Co., 67 Wis. 272.

usually or reasonably attendant upon his employment, he is then entitled to recover, unless it is shown that he knew of such unusual and unreasonable danger, and fully comprehended its nature at the time of his employment or before the accident happened. In such case there is no presumption that he assumed the unusual risk, and the burden of proof is on the defendant to show affirmatively that he did, to the same extent that it is on the defendant to show any other contributory negligence on the part of the plaintiff. The assumption of an unusual risk in any employment by the employee is in the nature of negligence on his part, which, like any other contributory negligence, prevents his recovery.¹

M. Distinction between Assumed Risk and Contributory Negligence.

938. The principles that underlie the doctrine of assumption of risk and contributory negligence are not the same. An allegation, therefore, that plaintiff was free from fault does not supply averments showing that the risk was not voluntarily assumed. It may be true that an employee exercises the utmost care, and yet be true that the risk assumed was an incident of the service in which he was engaged.²

939. The Indiana court places the doctrine of assumption of risk upon the contract; that the ordinary hazards are thus implied, and therefore that an action brought by a servant to recover for injuries is not one sounding in tort, but must be determined from the contract.³

940. Where an employee was injured by contact with a low bridge, and the circumstances were such as to charge him with an assumption of the risk, it was said: Having assumed the perils of his employment in respect to the bridge,

¹ *Nadau v. White River L. Co.*, 76 Wis. 120, 43 N. W. 1135. *v. Leydon*, 127 Ind. 50; *Louisville & N. R. Co. v. Orr*, 84 Ind. 50.

² *Louisville, N. A. & C. R. Co. v.* ³ *Ohio & Miss. R. Co. v. Ham-*
Corps, 124 Ind. 427; *Rogers et al.* *mersly*, 28 Ind. 371.

the question of contributory negligence was not in the case, for if he was not guilty of it he had no right of recovery.¹

941. Where the court instructed the jury, in substance, in a case where an engineer was injured, that he did not waive the defect by remaining in the company's employment without objection after knowledge of the defect, if in so doing he acted as an ordinarily prudent man would have done under the circumstances, it was held error, as it is immaterial in such a case what ordinarily prudent men would have done.²

942. Where a young boy was injured in a mill, and the question was presented as to his capacity to appreciate the dangers, it was said: The question on this branch of the case is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which he knowingly assumed the risk, or one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences.³

943. The principle that one may be debarred from a recovery when he voluntarily assumes a risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained to the jury. One may with his eyes open undertake to do a thing which he knows is attended with more or less peril, and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of. But whether or not he assumes the risk may depend upon other circumstances.⁴

944. Where the question of the burden of proof in cases of assumed risk was under discussion, it was said: The question of knowledge is distinct from that of contributory neg-

¹ Carbine's Adm'r v. Bennington & R. R. Co., 61 Vt. 349, 17 Atl. 491.

³ Coombs v. New Bedford Cordage Co., 102 Mass. 572-596.

² Worden v. Humeston & S. R. Co., 72 Iowa, 201.

⁴ Miner v. Conn. Riv. R. Co., 153 Mass. 398-403.

ligence. The general rule undoubtedly is that the plaintiff need not aver and prove that he was not guilty of contributory negligence. In a case like the present, however, the rule is different, for the reason that he must prove, and therefore must aver, that the injury complained of did not result from the ordinary hazards of the business which he is presumed to have voluntarily assumed.¹

945. Where the question was as to the assumption of the risk by an employee from unblocked frogs, it was said: We think confusion has crept into cases like this from the effort to determine them by the rules of contributory negligence. We do not think they necessarily furnish the correct criterion for determination, but that the contract of employment is a necessary element of consideration. The employee agrees to assume all risks ordinarily incident to his employment. If he is of mature years and knows what instrumentalities are to be used by him, he contracts that he will assume the risk incident to that class of instrumentality, as well as any other risk incident to the business; and if the master use proper care in providing the kind contemplated, the employee cannot complain, though some other kind would have been less dangerous; his contract hushes his complaint regardless of his negligence. As the deceased took employment contemplating the use of unblocked frogs, no instructions should have been given him as to negligence predicated upon that fact.²

946. Where an employee was injured by stepping into a hole in a platform upon defendant's premises, of the existence of which he had knowledge, and the charge of the court failed to draw a distinction between risks assumed and contributory negligence, and in effect stated the doctrine to be that, though the employee had knowledge, the question was whether he exercised ordinary care in view of such knowledge, it was said: The defense of contributory neg-

¹Bogenschutz v. Smith, 84 Ky. 330, 1 S. W. 578; Norfolk & W. R. Co. v. Jackson's Adm'r, 85 Va. 489, 8 S. E. 370.

²St. Louis, I. M. & S. R. Co. v. Davis, 54 Ark. 389, 15 S. W. 895.

ligence and of assumed risk are separate and distinct. The doctrines are applicable under different conditions. Contributory negligence in a case of this kind implies the existence of negligence on the part of the injured servant co-operating with that of the master, and thus aiding in producing the injury. The doctrine of assumed risks obtains without necessary reference to the existence of negligence. If a servant, with knowledge of a defect in the master's premises and of the danger and risk incident thereto, continues in the service of the master without proper notice to the latter, he assumes the risk incident to the service growing out of the existence of the defect, and this without regard to the degree of care which he may exercise in the performance of his labors.¹

947. The doctrine of *volenti non fit injuria* stands outside the defense of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the maxim often applies where there has been no carelessness at all.²

948. Assuming the risks of an employment is one thing, and quite an essentially different thing from incurring an injury through contributory negligence. Generally it is sufficient in actions for the recovery of damages to give instructions as to the effect of contributory negligence on the part of the plaintiff, but when the question arises as to the effect of knowledge, and the assumption of risks on the part of the plaintiff, something more is required. When it appears that a plaintiff has knowingly and voluntarily assumed the risk of an accident, the jury should be instructed that he cannot recover, and should not be permitted to consider the conduct of the defendant by itself and find that it was negligent, and then consider the plaintiff's conduct by itself and find that it was reasonably careful.³

¹ Texas & Pac. R. Co. v. Bryant (Tex. App.), 27 S. W. 825.

² Thomas v. Quartermaine, 18 Q. B. Div. 685-697.

³ Mundle v. Hill Mfg. Co., 86 Me. 400; Fitzgerald v. Conn. Riv. Paper Co., 155 Mass. 155; Conley v. American Express Co., 87 Me. 352.

949. It was said: We cannot agree that the risk to which an employer subjects his employee suffices to impose a liability upon the former as being extraordinary in character, merely because the injury in a particular case might possibly have been prevented by some different device; nor can we assent to the idea that it requires a combination of ordinary risk on the part of the employer and want of ordinary care on the part of the employee to relieve the employer from liability. If the risk is an ordinary one the employer is not liable, even if the employee did use ordinary care. In all such cases the risk of injury is one of the hazards which the employee assumes when he engages in the service, to which it is incident. This has always been the law.¹

950. It was early stated that where the servant, in obedience to the requirements of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution and skill, the rule is different. In such case the master is liable for resulting accident.²

951. Later it was said: A servant or employee assumes the risk of all dangers in his employment, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. The master's liability arises from the fact that he subjects his servant to dangers which in good faith he ought to provide against, but he is not responsible for the dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty. The rule as stated in *Patterson v. Railway Co.*, 76 Pa. St. 389, is thus extended.³

952. **Missouri rule.**—The Missouri court and the Federal Court of Appeals have, in some cases, applied the rule as stated in *Patterson v. Railway Co.*, 76 Pa. St. 389, without

¹ Northern Central R. Co. v. Husson, 101 Pa. St. 1.

³ Pittsburg, etc. R. Co. v. Sentmeyer, 92 Pa. St. 276.

² Patterson v. Pittsburg, etc. R. Co., 76 Pa. St. 389.

extending it, as was later done in *Pittsburg, etc. R. Co. v. Sentmeyer*, 92 Pa. St. 276, to cases where there were no express assurances of safety.¹

953. It was said: Knowledge of the unsafe condition of the track by an employee would not defeat a recovery if it was not so dangerous as to threaten immediate injury, or if such employee might have reasonably supposed that he could safely work on it by the use of care and caution.²

954. The same was said with reference to an employee as to the use of a foot-board upon a switching engine which was constructed in such a manner as to slightly slant to the front.³

955. Also to an employee who had knowledge that frogs in the track were not blocked.⁴

956. The history of the rule was reviewed later. The court refused to apply it where an employee was killed while boarding up a shaft in a mine, who presumably lost his balance while standing on a narrow gutter. It was said that the danger was obvious and continuous and that he assumed the risk.⁵

957. Where the question was whether the employee had knowledge that the cars were out of repair, and of defects in the road-bed, and of the competency of the foreman, it was held that such knowledge was not necessarily conclusive that an employee claiming to be injured by such defects and such incompetency assumed the risk therefrom. It was said: Even if he had the supposed knowledge, it was a question for the jury whether or not, under the circumstances, he ought to have attempted to make the coupling, and in so doing was himself negligent, or to be considered as having voluntarily assumed the risk of his act. The question was one essentially of contributory negligence.⁶

¹ See 953-957 and 959-961.

92 Mo. 440; *Hamilton v. Rich Hill*

² *Soeder v. St. L., I. M. & S. R. Co.*, 100 Mo. 673.

Mining Co., 108 Mo. 364.

⁵ *Fugler v. Bothe*, 117 Mo. 475.

³ *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205.

⁶ *Louisville & N. R. Co. v. Kelly*, 63 Fed. 407 (C. C. A.).

⁴ *Huhn v. Missouri Pac. R. Co.*,

958. An employee was called upon to ascend one of the poles of the company for the purpose of trimming a lamp at its top. One of the steps used for climbing the pole was broken off. He saw the defect before he attempted to ascend the pole. He ascended the pole safely, but, in descending, his foot slipped when he reached the broken step, causing him to fall, by reason of which his leg was injured. The jury were directed to inquire whether the danger arising from the absence of the step on the pole was of such imminent character that a person of ordinary prudence, having regard for his own safety, would have declined to use it. If so, the jury were told that the plaintiff could not recover; but if it were otherwise, if the peril was not so imminent and threatening but that he might go up with safety to light and trim the lamp and get back by the exercise of extra care, then, if he was injured in the exercise of such extra care, he could recover. This was held error.

It was said: The danger was open and obvious, and the plaintiff could have been in no doubt as to the extent of the risk he assumed. If the servant knows of the defect, and it is of such a nature that a prudent person will not abandon the service on account of it, then no negligence can be charged to the master for permitting the defect to continue. If the plaintiff was justified in concluding that he could ascend the pole, and return with safety by using extra care, the defendant had the right to draw the same conclusion, and in that event the defendant was in no fault. If the peril was of such imminent character that it was imprudent on the part of the plaintiff to attempt to ascend the pole, then under the rule laid down by the trial judge the verdict was wrong. If the plaintiff acted as a prudent man in undertaking to ascend the pole, the injury must be ascribed to mere accident—the casual slipping of the foot. In that case neither he nor his employer is to be held guilty of a want of care. The servant and the master had equal means of forming a correct judgment. Therefore whatever want of prudence in taking the risk is chargeable to the one must be imputed

to the other. The attempt to ingraft this exception upon the general rule introduced the element of the absence or presence of due prudence on the part of the servant into this discussion, which is a circumstance wholly foreign to it. The immunity of the master rests upon the contract of hiring, and not upon the absence or presence of negligence in either party. The master says to the servant: "You understand fully the nature of the employment and the danger attending it, will you enter it?" The servant says: "I accept it," and the law implies that he accepts it with all the risk incident to it, without regard to the magnitude of the danger.¹

959. It was held that it was not conclusive evidence of negligence on the part of a fireman upon a locomotive to remain in the service when he had knowledge of a defect in an air-brake, but it was a question for the jury whether the defect was such that a man of ordinary prudence and intelligence would have remained, and also whether the accident would have happened had the brake been in proper order.²

960. It was said of a yard-master that he was not required to quit the service or refuse to perform the work devolving upon him, although he knew of the dangerous condition of the company's car-yard, provided the same was not so far dangerous as to threaten immediate injury, or so dangerous but that he, as a reasonably prudent man, could come to a well-grounded conclusion that he could safely perform his duty.³

961. Where an adult was injured while letting himself down from a car, having forgotten that one of the steps was missing, and the court failed to observe any other consideration as being involved than that of contributory negligence, it was said: We are of the opinion the court erred in not submitting to the jury to determine whether the

¹ *Foley v. Jersey City E. L. Co.*,
54 N. J. L. 411, 24 Atl. 487.

³ *Dwyer et al. v. St. Louis & S. S.
R. Co.*, 52 Fed. 87.

² *New Jersey & N. Y. R. Co. v.
Young*, 49 Fed. 723.

plaintiff, in forgetting or not recalling at the precise moment the fact that the car from which he attempted to let himself down was one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling and under the circumstances in which he was placed.¹

962. The court refused to sustain the proposition that, as matter of law, if the injured servant knew of the defect, or by the exercise of ordinary care and diligence could have known of it, and still continued in the employment, he could not recover, upon the ground that negligence was a question for the jury.²

¹ Kane v. Railway Co., 128 U. S.
94.

² La Sure v. Graniteville Mfg. Co.,
18 S. C. 275.

CHAPTER III.

CARE.

NOTE.—Almost every case involving the master's or servant's duty presents the question of care. Only a few cases are given under this head, as the rule as applied is stated under the several subdivisions relating to their duties.

963. The degree of care and prudence which the master is bound, as between himself and his employee, to exercise in providing the tools, machinery and appliances for transacting the business of the employment, is that reasonable care and prudence which every prudent man is expected to employ in providing himself with the conveniences of his occupation.

This rule was declared where damages were sought to be recovered for the death of an employee, caused, as was alleged, by the track being unsafe from sand being washed upon it during a storm.

The trial court charged that it is the duty of those who use hazardous agencies to control them carefully, and to use every ordinary, known and usually approved invention to lessen danger, and to guard against every ordinary probable danger by such means as ordinary prudence would suggest or dictate; and railroad companies are bound to take notice of the topography of the country along their lines of road, and to take notice of the climate of the country in which their roads are, and about the storms and floods that annually occur in those localities, and make all necessary guards against danger caused by ordinary and usually severe storms of the locality where the road is located. It was the duty of the defendant to so construct its road as to make it reasonably safe, and guard against washouts, landslides and obstructions which might endanger the lives of the passen-

gers and employees passing over the same; and any neglect of the defendant in that behalf would make it liable to the plaintiff, if such neglect caused the injury. It was also the duty of the defendant to keep its road in suitable and safe repair, and keep and maintain suitable ditches and culverts at suitable and proper places to carry off the surplus water naturally running down upon the track or road of the defendant company; and the neglect of the company to perform that duty, if such neglect was the cause of the accident, would make the defendant liable.

It was held that the language lays down a rule as to the degree of care required, at least as high as is required between a carrier and a passenger, and portions of it even go beyond that, and was error.¹

964. Reasonable care, and not the highest efficiency which skill and foresight can produce, is the measure of a man's liability to his servant. He performs his whole duty by using as much care in the selection of materials for the use of his servants as a man of ordinary prudence in the same line of business would use while acting with regard to his own safety in supplying similar things for himself were he doing the work.²

965. The standard of ordinary and reasonable care is invariable, such care being that of every prudent man. But the care of a prudent man varies according to circumstances, dependent upon the degree of danger. It is a relative and not an absolute term. The degree of care and foresight which it is necessary to use (in any given case) must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against; and it should be that care and prudence which a discreet and cautious individual would or ought to use if the whole risk and loss were to be his own exclusively.³

¹ *Gates v. Southern Minn. R. Co.*,
28 Minn. 110.

³ *Central R. & B. Co. v. Ryles*, 84
Ga. 420, 11 S. E. 499.

² *Carlson v. Phoenix Bridge Co.*,
132 N. Y. 273.

966. Ordinary care, in a general sense, is such a care as is commonly exercised by the majority of the community or by persons of ordinarily prudent habits. Ordinary care by the employees of a railroad company is that degree of care which the majority of men of careful and prudent habits would exercise under like circumstances to avoid injury to their own person from the same risks which others undergo in obedience to orders or by reason of their hazardous business.¹

967. The measure of care a master must take to avoid responsibility for injury to his servant is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own. Ordinary care is such as a person of ordinary prudence would exercise under the circumstances.²

968. An instruction that it is the duty of the master to furnish his servants with good and safe machinery, in good condition, with which to perform the labors and duties of their employment, was held to be error. The rule was said to be, that it was not the duty of the master to furnish safe machinery, but to use reasonable diligence in furnishing safe machinery for his employees.³

969. Where the question was as to the degree of care an engineer who was injured should have observed in looking out for dangers, it being insisted that it was his duty as engineer of a passenger train to use the utmost human care and foresight for the safety of his train, but the trial court instructed the jury "that such employee owed the defendant the duty of exercising ordinary care and diligence in the

¹ Louisville, etc. R. Co. v. McCoy, 39 Kan. 1, 17 Pac. 81 Ky. 403, 15 Am. & Eng. R. R. Cases, 277. Co. v. Kanaley, 39 Kan. 1, 17 Pac. 324; Atchison, T. & S. F. R. Co. v. Wagner, 33 Kan. 660; Kansas City & P. R. Co. v. Ryan, 52 Kan. 637, 35 Pac. 292; Eddy et al. v. Adams (Tex.), 18 S. W. 490; Gulf, C. & S. F. R. Co. v. McNeill (Tex. App.), 25 S. W. 647; C. & A. R. Co. v. Kerr, 148 Ill. 605, 35 N. E. 1117.

² Berns v. Gaston Gas Coal Co., 27 W. Va. 285.

³ Texas & Pac. R. Co. v. Huffman, 83 Tex. 286, 18 S. W. 741; Gulf, C. & S. F. R. Co. v. Wells, 81 Tex. 685, 17 S. W. 511; Hannibal & St. J. R.

performance of his duties; that is, such care as persons of ordinary prudence would exercise under the same circumstances; that whether the plaintiff exercised that degree of care was to be determined in view of all the circumstances, such as the liability to danger at the time, the nature and extent of the danger, and the consequences that might be expected to result from a want of care; that the care must be commensurate with the risks of the situation,"—it was held that the court correctly stated the rule of law applicable to the case.¹

970. It was held error to charge that a railroad company is bound to furnish competent men to handle its trains and the appliances for switching trains which experienced railroad men have found are best adapted for that purpose, as the company is only required, in the selection of its employees and in the furnishing of appliances, to use such care as an ordinarily prudent man would use under the circumstances.²

971. It is said that an elevator is in many respects a dangerous machine, and though it may primarily be intended for a freight elevator, yet if the employees in the course of their employment are authorized or directed to use the elevator as a means of personal transportation, the employer, controlling the operation of the elevator, is required to exercise great care and caution, both in the construction and operation of the machine, so as to render it as free from danger as careful foresight and precaution may reasonably dictate. Nothing short of this will excuse the defendant unless it appear that the plaintiff himself, or the party under whom the plaintiff is allowed to claim, was guilty of direct contributory negligence in the production of the disaster.³

972. It was error to charge that railroad companies must exercise a high degree of care in the operation of their roads,

¹ Hall v. C., B. & N. R. Co., 40 Minn. 439, 49 N. W. 239. Schwabbe, 1 Tex. Civ. App. 573, 21 S. W. 706.

² Gulf, C. & S. F. R. Co. v. ³ Wise v. Ackerman, 76 Md. 375, 25 Atl. 424.

since the degree of care required is that used by a person of ordinary prudence in the business under investigation. It is also error to instruct that the company is required to furnish its employees with good materials and suitable appliances, since this may be understood to mean safe or perfect materials and appliances.¹

973. As an illustration of the duties the defendant owed to its employees, the court remarked that the defendant was to act as any prudent man would if he were acting as employer and employee; that he should not put his help in any place of danger that he as a prudent and careful man would not put himself, if he was doing the work himself, both as employer and employee. It was said that this would not be a correct rule of conduct in all cases. An employer might in certain circumstances send an employee in a dangerous place, where as a prudent man he would not go himself, but was correct as applied to the particular facts.²

974. In an action against a railroad company for the death of a fireman caused by the derailment of an engine, it was held error to charge that the master was bound to furnish his servants with a reasonably safe place in which to work, and with safeguards against accidents, since the servant assumes the ordinary risks of the employment in which he engages. It was also held error to charge that the master is bound to maintain suitable and safe engines and machinery for his servants, since the master's duty is performed if he use due care and diligence to effect that end.³

975. An instruction that a railroad company owes the duty to its employees to do all that human care, vigilance and foresight can do, consistently with the practical operation of the road, in providing a safe road, road-bed, track, ties and rails, and to keep the same in repair, was held to be erroneous. It was further held, however, that such instruc-

¹ *Gulf, W. T. & P. R. Co. v. Abbott* (Tex. App.), 24 S. W. 299.

² *Morrissey v. Hughes*, 65 Vt. 553, 27 Atl. 205.

³ *St. Louis S. W. R. Co. v. Jagerman*, 59 Ark. 98, 26 S. W. 591.

tion was harmless error where the evidence clearly showed that the road-bed was defective and that the division superintendent had notice of the defect several hours before the accident to the plaintiff. In such case the issue is whether the company gave its employees proper notice of the danger.¹

976. It was held error, in an action by a servant against the master for injuries caused by the breaking of a chain, to refuse an instruction that the master was not an insurer of the servant, and was not bound to provide machinery or appliances which were absolutely safe; that he was bound to use only reasonable and ordinary skill and diligence in procuring safe machinery; and that the mere fact that an accident occurred did not raise the presumption that the master was at fault in providing machinery and appliances. It was said: "Where the employer exercises all the care and caution which a prudent man would ordinarily take for the safety and protection of his own person, under the same circumstances, he cannot be held liable for the consequences of a defect in the machinery or appliances used."²

977. An employer, while moving machinery from an old building into a new one, and making alterations in the new building, is not held to the same degree of strictness in the care of his employees during the alterations as is required of him after the alterations are completed. An employee was injured by the act of a foreman in letting fall a piece of shafting. It was held that a nonsuit was proper.³

978. It was said that, in so hazardous a business as that of a railroad, ordinary care and diligence in the selection and supervision of employees and agents would not suffice against third persons, and should not against the employees. Our own authorities require due care and diligence, which is a

¹ Chicago & Alton R. Co. v. Kerr, Co. v. O'Conner, 115 Ill. 254, 3 N. E. 148 Ill. 605, 35 N. E. 1117. 501.

² Brymer v. Southern Pac. R. Co., ³ Rooney v. Carson et al., 161 Pa. 90 Cal. 496; Lake Shore & M. S. R. St. 26.

higher degree than is expressed by the term "ordinary," and is perhaps sufficiently expressive and definite.¹

979. It was said subsequently, however, that the master's duty was that of exercise of ordinary care, which was stated to be such care as men of ordinary prudence exercised under like circumstances for their own protection, in the selection of careful and skilled servants and in furnishing fit and safe materials.²

980. Again it was said: The measure of duty on the part of a railroad company is that degree of care which very careful and prudent men exercise in their own affairs.³

981. "Ordinary care on the part of a railroad company implies, as between it and its employees, not that degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences as may result from negligence on the part of the employer, is fairly commensurate with the perils and dangers likely to be encountered. Ordinary care implies, as between the employer and the employee, such watchfulness, caution and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise."

The court further say they "cannot give their assent to the doctrine that ordinary care, in such cases, means only that degree of diligence which is customary, or is sanctioned by general practice and usage which obtains among those intrusted with the management and control of railroad property and railroad employees; that the degree of care ordinarily exercised in such matters may not be due or reasonable or proper care, and therefore not ordinary care, within the meaning of the law."

¹ Alabama & Florida R. Co. v. Ala. 13; Louisville & N. R. Co. v. Waller, 48 Ala. 459. Allen, 78 Ala. 494.

² Smoot v. Mobile & M. R. Co., 67 ³ Louisville & N. R. Co. v. Davis, 91 Ala. 487, 8 So. 552.

The deduction which I draw from this language, as used, is that an imperative duty to exercise reasonable care in furnishing reasonably safe appliances cannot be excused on the ground of a general custom which would permit the disregard of such duty; that custom alone cannot excuse a failure of duty, as they say further: "If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to be exercised."¹

¹ Wabash Ry. Co. v. McDaniels, 107 U. S. 454.

CHAPTER IV.

CONCURRING NEGLIGENCE AND PROXIMATE CAUSE.

See PREMISES, PLACE MADE UNSAFE BY ACT OF FELLOW-SERVANT; FELLOW-SERVANTS.

982. If the negligence of the master contributed to, that is to say, had a share in producing, the injury, the master is liable, even though the negligence of a fellow-servant was contributory also. If the negligence of the master contributed to it, it must necessarily be an immediate cause of the injury, and it is no defense that another was likewise wrong.¹

983. If the negligence of the master combines with the negligence of a fellow-servant, and the two contribute to the injury, the servant injured may recover damages of the master.²

984. If the master furnishes defective machinery to his servants with which to perform the services for which he is employed, and of which defect the servant is ignorant, and the servant is injured thereby, without fault on his part, the master will not be excused from liability for such injury by reason of the fact that a co-employee, a fellow-servant, was guilty of negligence which contributed to the injury.³

985. If there is a latent danger in the work and the servant is inexperienced in the work and ignorant of the danger, which is known to the master, and the servant is injured by such latent danger, the master will not be excused from liability because one of his servants, a fellow-servant of the one injured, is guilty of negligence in failing to perform an act which would have prevented the injury. The concur-

¹Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700.

²Fisk v. Central Pac. R. Co., 72 Cal. 38.

³Gulf, C. & S. F. R. Co. v. Kiziah, 86 Tex. 81, 23 S. W. 578; Railway Co. v. Kirk, 62 Tex. 227; Railway Co. v. Whitmore, 58 Tex. 276.

ring negligence of the fellow-servant will not excuse the negligence of the master in such cases.¹

986. If an injury be caused by the concurring negligence of a fellow-servant, and a superior who is not a fellow-servant, the master will be liable.²

987. The law now seems to be well settled that where the negligence of the defendant contributes to, that is to say, has a share in causing, the injury, the master is liable, even though the negligence of a fellow-servant of the plaintiff is also contributory.³

988. It was said: If it were conceded that the mine boss was a fellow-servant of the appellant, and not the representative of the employer, still his negligence would not absolve the employer, although it may have concurred with the negligence of the latter in producing the injury. Where the master is negligent he is responsible, although the negligence of a fellow-servant may have concurred in bringing injury upon the plaintiff.⁴

989. Where the master furnishes defective machinery for use in the prosecution of his business he is not excused by the negligence of a servant using the machinery from liability to a co-servant for an injury which could not have happened had the machinery been suitable to the use to which it was applied. Where, therefore, the employee of a railroad corporation was injured by the sudden starting of a locomotive, caused by its being defective and out of repair, of which defects the corporation had notice, it was held that it was no defense that the engineer could have so managed the engine as to have prevented the accident.⁵

990. Where the negligence of an engineer of a train, in the manner in which he operated it, was contributory with

¹ *Gulf, C. & S. F. R. Co. v. Kiziah*, 86 Tex. 81, 23 S. W. 578; *Jones v. Florence Mining Co.*, 66 Wis. 268.

² *Norfolk & W. R. Co. v. Phelps*, 90 Va. 665, 19 S. E. 652.

³ *Morrissey v. Hughes*, 65 Vt. 553, 27 Atl. 205.

⁴ *Rogers et al. v. Leydon*, 127 Ind. 50; *Cincinnati, etc. R. Co. v. Lang*, 118 Ind. 579.

⁵ *Cone v. D., L. & W. R. Co.*, 81 N. Y. 206.

the negligence of the company in not providing a sufficient number of brakemen, and their combined negligence in the respect named was the cause of an injury to a co-employee of such engineer, it was held that the negligence of the engineer did not have the effect to relieve the company from liability.¹

991. Where the track used by the defendant company was out of repair and unsafe, and the plaintiff, an employee on a train thereon, was injured by the rails spreading, it was held that the company was liable, though also it was found by the jury that the conductor, a co-employee, was also negligent in running such train at a dangerous rate of speed, considering the condition of the track.²

991a. An engineer of a road-engine was injured by a collision with the switch-engine in the yard. There was evidence to the effect that the former was unable to see the switch-engine by reason of the head-light upon the switch-engine not being in perfect condition. It was held that even if it were conceded that the engineer of the switch-engine was his fellow-servant, still that would not exonerate the master; if there was neglect on his part to see that the head-light was in proper condition it would then be a case of concurring negligence.³

992. An employer who negligently permits the use of a machine in doing his work which, by reason of its defects, is unnecessarily dangerous to his employees, is liable for any injuries resulting from its use to an employee who was not himself negligent, even though a co-employee was guilty of negligence in managing the machine, and if it had been carefully handled the accident would not have occurred.

This was said where the claim was that an edger in a saw-mill was out of repair, and while being used a board was

¹Booth v. Boston & Albany R. Co., 73 N. Y. 38.

³San Antonio & A. P. R. Co. v. Harding et al. (Tex. App.), 33 S. W.

²Stetler v. C. & N. W. R. Co., 49 Wis. 609.

thrown back, injuring an employee other than the one operating it.¹

993. It was said in reference to the use of a boiler without fusible plugs, required to be used by a statute: "We are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest or the positive rules of law require, he is not to be responsible for an injury resulting from such use because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury." ²

994. Where a railroad company retained a switchman in the service after it was chargeable with knowledge of his habitual disregard of the rules relating to locking switches, and requiring him to remain at his post until trains had passed, though it appeared the engineer of a train derailed, caused by such neglect, was also negligent in not observing the position of the target, it was held that a case was presented for the application of the rule.³

995. The rule was applied where a brakeman in the employ of a railroad corporation was injured by the fall of a trestle work supporting a portion of a spur-track, which trestle was intended for use for an indefinite period of time, where the fall was caused partly by the defective manner in which the trestle was constructed and partly by the negligence of a fellow-servant of the injured employee. A distinction was drawn between temporary appliances and structures.⁴

996. The rule was applied where an employee was injured by another employee running against him, causing him to fall, and it was alleged that the platform upon which the employees were working was too narrow and somewhat obstructed with materials.⁵

¹ *Sherman v. Menomonee River Lumber Co.*, 72 Wis. 122.

⁴ *Elmer v. Locke*, 135 Mass. 575.

² *Cayzer v. Taylor*, 10 Gray, 274.

⁵ *Young v. Shickle, H. & H. Iron Co.*, 103 Mo. 324.

³ *Coppins v. N. Y. C. & H. R. R. Co.*, 122 N. Y. 557.

997. The rule was applied where it was claimed that the negligence of a foreman and that of the officers of the company in not detecting a defective brake-rod co-operated with the negligence of a fellow-servant as the cause of injury to an employee.¹

997a. Where a brakeman was injured, as was alleged, by reason of a defective car-wheel, he having no knowledge of the defect, the court properly refused an instruction that, if fast running contributed proximately to the accident, the train being operated at the time by fellow-servants of such brakeman, he could not recover. It was held that he could recover on the ground that, if such were the fact, it was a case of concurring negligence.²

998. Where it was contended that the accident was caused in part by the negligence of one who loaded logs upon the cars, who was an independent contractor, and of the defendant in the condition of its track, it was held that the question of the negligence of such loader was immaterial, as the defendant would be liable notwithstanding his negligence.³

999. The rule was applied where, under existing conditions, an engineer of a train negligently ran his engine at too great rate of speed and came in collision with cars standing on the track, running by a signal, being unable, by reason of the speed and a defect in the air-brake, of which defect the defendant had notice, to check his train after discovery of the danger. A fireman was injured as the result.⁴

1000. Where a section-hand was on a hand-car with other employees under control of a section-boss, and an extra train approached which gave no warning or signals, and it appeared that the brake appliance on the hand-car was defective, and in the face of imminent peril such employee jumped from the hand-car and was injured, it was held that the

¹ Cowan, Adm'r, v. C., M. & St. P. R. Co., 80 Wis. 284.

² Houston & T. C. R. Co. v. Kelley (Tex. App.), 35 S. W. 878.

³ Haley v. Jump River Lbr. Co., 81 Wis. 412.

⁴ Young v. New Jersey & N. Y. R. Co., 46 Fed. 160; affirmed, 49 Fed. 723 (C. C. A.).

jury were warranted in finding a verdict for the plaintiff, upon the ground that the negligence of a fellow-servant would not excuse the defendant's liability to a co-servant for an injury which would not have happened had proper appliances been furnished.¹

1001. A master was held liable for injuries to a fireman from the derailment of a train, caused by the worn condition of a rail over which the train was run by the engineer at a speed greater than that authorized by the schedules, though but for such improper speed the derailment would not have happened.²

1002. The rule was applied where it was found that the employer was negligent in furnishing a coupling-pin which was old and bent and that the bumpers and dead-woods upon the cars were not properly arranged, and also that the yard-master, a fellow-servant of an employee injured, in attempting to make the coupling, was also negligent, and that their combined negligence produced the injury.³

1003. Where an employee upon a gravel train was injured by a collision with a freight train while such gravel train was standing on the main track by special order of the superintendent, and it appeared that the conductor, as was his duty in such cases, sent out a flagman to give warning to an approaching train, who so negligently performed his duty that the warning was mistaken by the engineer, resulting in the collision; and the court having held that whether such order of the superintendent, under the circumstances, was a reasonable one was for the jury, and the jury having found that it was not, and the further question was presented as to the effect of the negligence of such flagman, it was said: Where the special order in respect to the management of a particular train, which is, under the

¹ Northern Pacific R. Co. v. Charless, 51 Fed. 562 (C. C. A.). See Northern Pacific R. Co. v. Charless, 162 U. S. 359, where the decision of the circuit court of appeals was reversed.

² Clyde et al. v. Richmond & D. R. Co., 59 Fed. 394.

³ McMahon v. Henning, 3 Fed. 353.

circumstances, unreasonable, and by the execution of such order a servant of the corporation, himself without fault, is injured, it will be no answer to the action of the injured party against the corporation to say that the immediate cause of the injury was the negligence of a fellow-servant of such injured party in the execution of an unreasonable order.¹

1004. The defendant, an individual, caused to be piled a large number of smoke-stacks, boilers and other materials along side of and very near the track of a railroad company. A train of cars running on said track caught one of the stacks, pushed it along the track to a stairway leading up to a signal-tower where the plaintiff was employed, careening the tower and inducing the plaintiff to jump therefrom, from fear of injury, whereby he was in fact injured. In a suit against the defendant who caused the material to be thus dangerously placed near the track, it was urged that, if it was negligence to pile the material there, it was negligence for the railroad company to operate its trains with knowledge of the location of the material and the consequent danger, and such negligence on the part of the latter being an independent, efficient and wrongful cause, intervening between the original act and the injury ultimately suffered, must be considered the proximate cause of the injury.

It was said by Justice Mitchell, rendering the decision of the court, that the railroad company was negligent in running its trains without causing the dangerous obstructions to be removed, but still the negligence of the defendant in placing them there was the proximate cause of the injury, although it would not have occurred but for the succeeding negligence of the railroad company. It was simply a case of concurrent or successive negligence of two persons combined together, resulting in an injury to a third person, for which he may recover damages from the one guilty of the first wrong, notwithstanding the succeeding negligence of the other united in producing the injury.²

¹ *Railway Co. v. Henderson*, 37 Ohio St. 549.

² *Martin v. North Star Iron Works*, 31 Minn. 407.

1005. Where injury to a miner was caused by the unsafe condition of the roof of a mine, and it was urged that the pickers and shovelers were to watch for each other, and upon discovery of danger to give warning, and that the injury was caused by their negligence in this respect, it was said: Even if there had been such evidence we would then have a case of combined negligence, which would not excuse the defendant. It is only where the negligence of a fellow-servant is the whole cause of the injury that the master is excused.¹

1006. Where an employee was injured, as was alleged, by the defective condition of the track, and it appeared that the consequences of the defective condition of the track ought to have been avoided had the section-master given the proper signals, and the failure to do so on his part was negligence, and one of the proximate causes of the injury sustained, it was held that the negligence of the section-master and that of the defendant company were each of them proximate causes, without the concurrence of which the injury would not have been sustained, and under the rule applicable in such cases the defendant is liable as though it was the sole offender.²

1007. Where a brakeman was injured while descending a car to uncouple it from the engine, and the bumper was broken off, and it was alleged that the defect in the car was the proximate cause of the injury, though it appeared that the engineer suddenly, without giving the customary signals, backed the engine against him, to the argument that the injury was due to the negligence of the engineer who was a fellow-servant, it was said: It is the universally recognized duty as well of a railroad company as of any other

¹ *Deweese v. Meramec I. M. Co.*, 128 Mo. 423, 31 S. W. 110. See, also, *Island Coal Co. v. Risher* (Ind. App.), 40 N. E. 158. This construction of the decision in the foregoing case is stated in *Norfolk & W. R. Co. v. Nuckol's Adm'r*, 91 Va. 193, 21 S. E. 342.

² *Moon's Adm'r v. Railroad Co.*, 78 Va. 745.

employer to provide suitable appliances for the conduct of its business and to keep them in repair, and if in consequence of its failure to do so a servant in its employ is injured without any fault on his part, it cannot successfully defend on the ground of the negligence of a fellow-servant. The servant, although he assumes the ordinary risk of business, including the negligence of fellow-servants, does not contract against the combined negligence of a fellow-servant and his employer.¹

1007a. The doctrine of concurring negligence was applied where a barrel used for heating water by steam exploded, injuring a servant drawing water from the barrel, the explosion being caused by the insertion of a wooden plug in the vent-pipe by co-servants of the one injured.²

1007b. Where an employee was injured while using a hand-car, as was alleged, by reason of the absence of a brake; that he, in company with others of the crew, was accustomed to use such car and another in going to and from their work, and that on discovering the defect he requested and was allowed to ride upon such other car, and sometime thereafter was injured while on such car, which was in front of the one without a brake, and the reason alleged was that the car without a brake ran into the car upon which he was riding, those in charge of the former being unable to control its movements by reason of the lack of such brake, it was held that such employee did not, as matter of law, assume the risk incident to the use of such car. The doctrine of concurring negligence was applied, which was stated to be that where a servant is injured directly through the negligence of his master in furnishing his fellow-servants defective appliances, the master is liable, though the negligence of the fellow-servants in the use of the defective appliances may have contributed to the injury.³

¹ *Richmond & D. R. Co. v. George*,
88 Va. 225, 13 S. E. 429.

³ *International & G. N. R. Co. v. Williams* (Tex. App.), 34 S. W. 161.

² *Crowell v. Thomas*, 35 N. Y. S.
936.

1008. Where the fireman was injured by the derailment of an engine, caused by a defect in the flange of a wheel, and also by a defect in the brakes upon the engine, the following charge was held to correctly state the law: "If you believe from the evidence that one of the proximate causes of the accident, without which it would not have occurred, was the unsafe condition of the wheel or brake, or both, as claimed by the plaintiff, and plaintiff himself was not guilty of negligence in failing to apply the means furnished to stop the engine, and that defendant was guilty of negligence in furnishing them as hereinbefore explained, then defendant would be liable for an injury to plaintiff therefrom, notwithstanding the negligence of the engineer or brakeman may have contributed to the accident." It was said that a distinction is to be noted between negligence in furnishing unfit or defective machinery to a servant, and the careless or improper manner in which the machinery, when not defective, is used by a fellow-servant.¹

1009. The declaration was that the deceased, a freight conductor, was injured by reason of the action of the defendant in failing to furnish him with a proper caboose, but supplied him with a poorly-built box-car, without doors or windows in the ends or lookout-station in the top. That he used the car upon promise of the defendant to furnish a proper caboose, which it failed to do, and that one of defendant's trains negligently ran into the rear of decedent's train, causing the injuries complained of. The real question presented by demurrer was: What was the proximate cause of the injury to the deceased? Whether negligence of fellow-servants upon the second train; negligence of the company in failing within a reasonable time to provide deceased with a suitable car, or the combined result of both negligences?

Coming to the latter ground, after defining generally what is proximate cause, it is said: The question is, Could the defendant have foreseen by any ordinary or extraordinary

¹ St. Louis & S. F. R. Co. v. McClain, 80 Tex. 85, 15 S. W. 789.

foresight, that, because of its negligence to furnish such caboose, another train upon its tracks would negligently run into this caboose rather than into one properly built and fitted up. If the second train is eliminated from the consideration of the case, was the negligence of the company to furnish a proper caboose in any manner whatever the cause of the death of such employee?

It was held that under the allegations of the declaration it did not appear that the kind of car furnished had any connection with the injury. If, however, the allegations had been that, by reason of the negligence of the defendant in failing to furnish a way-car with windows in the end and with a cupola, the deceased was unable to see the approaching danger, for which he was on the lookout, and therefore he was injured, he probably would have alleged a good cause of action.¹

1010. In the operation of a freight train in the nighttime the train broke apart, and the forward part of the train, being afterwards stopped, was run into by the detached rear cars, including the caboose, and the conductor, who was in the caboose, was killed by the collision. There was evidence tending to show that the immediate cause of the breaking apart of the train was the letting off of a brake on one of the rear cars, caused by the jar of the car in its motion. There was also evidence tending to show that at the time there was a sudden increase of speed of the locomotive. The question presented was that of proximate cause. It was said: It was a proper inference from the evidence that the sudden release of the brake was the immediate and direct cause of the breaking of the coupling. The starting forward of the locomotive upon a down grade may have contributed with the defective brake to cause the train to break apart. But that was one of the ordinary incidents of the movement of the train, which did not prevent the defective brake being deemed a legal and proximate cause of the result. The subsequent collision is further removed

¹ Lutz et al. v. Atlantic & Pacific R. Co. (N. Mex.), 30 Pac. 912.

from that cause in the order of events, but not so in its casual relation.

The principle was applied that a wrong-doer is at least responsible for all the injuries which resulted as a natural consequence from his misconduct—such consequences as might reasonably have been anticipated as likely to occur.

The liability of such a collusion occurring from the breaking apart of a freight train when in motion is apparent. The case is not one for the application of the rule that an intervening, independent, wrongful act, by which the injury is immediately caused, and for which the defendant is not responsible, forbids a recovery for the remote cause, and remits the party to his remedy against him to whose misconduct the injury is immediately attributable. We look upon the negligence of the defendant as being in operation, as an efficient cause, down to the time of the final catastrophe. The contributory circumstance of the stopping of the train was not an independent, efficient cause of injury, but was a circumstance caused by the negligence of the defendant, and for which it is responsible, being but a natural and probable result of the breaking apart of the train.¹

1011. Where an employee was injured while performing labor near a large rotary saw, which was covered on the side where he ordinarily performed his duties, but was unboxed in part on the opposite side, and his injuries were caused by his slipping on the floor and his foot coming in contact with the saw, the finding of the jury that it was negligence to maintain the saw thus exposed was sustained, as well as that it was a concurrent cause of the accident.²

1012. Yet in another court, where a boy only twelve years of age was injured in nearly a similar manner, it was held that the cause of the injury was the accidental slipping of the foot, for which no one was responsible.³

¹ *Ransier v. Minneapolis & St. L. R. Co.*, 32 Minn. 331.

³ *Buckley v. G. P. & R. M. Co.*, 113 N. Y. 540.

² *Darcey v. Farmers' Lumber Co.*, 87 Wis. 245.

1013. Where a yard switchman in uncoupling cars was walking or running with the train, for the purpose of lifting the pin, and stumbled over a piece of coke on the track, and his arm was thrown between the dead-woods, it was held that the stumbling was the proximate cause of the injury, and evidence as to the defective condition of the draw-bar was immaterial.¹

1013a. Where an employee on observing a train approaching from behind could have jumped from the hand-car, others of his fellows having done so and escaped injury, but he remained and in attempting to remove the car was killed, it was held that his own act was the proximate cause of the injury.²

1013b. A section-hand was injured while in a cut. He stood upon an embankment of loose earth, which gave way and he fell under the wheels of a passing train. He was directed by his foreman not to go there until the train had passed. It was held that if it were conceded that the company was negligent in the matter of leaving the loose dirt so near the track, yet the disobedience of the foreman's order was the proximate cause of his injuries. Therefore he could not recover.³

1013c. A fireman was injured while under his engine. It appeared that there was an established custom between engineers and firemen that if either went under the engine he should notify the other. The engineer was not notified, and the latter opened the blow-off cock, causing the injury. It was held that the failure to notify the engineer of his position was the proximate cause of the injury. It was immaterial that the engineer was also negligent.⁴

1013d. Where an engineer of a regular train was killed in a collision with an extra, and the rules required that such extra train should have side-tracked instead of remaining

¹ Cincinnati, N. O. & T. P. R. Co. v. Mealer, 50 Fed. 725 (C. C. A.).

³ Styles v. Receivers of Richmond & D. R. Co. (N. C.), 24 S. E. 740.

² Nelling v. C., St. P. & K. C. R. Co. (Iowa), 67 N. W. 404.

⁴ Crane v. C., M. & St. P. R. Co. (Wis.), 67 N. W. 1132.

on the main track, it was held that ordering the latter train to run as an extra, and failure to notify the decedent of such fact, was not the proximate cause of his death, but rather the failure of his fellow-servants in charge of the extra train to comply with the rules.¹

1014. One is responsible for such consequences of his fault as are natural and probable; but if his fault happen to concur with something extraordinary, and therefore not likely to be foreseen, he will not be responsible for the unexpected result.²

1015. Exceptions and not within the rule.—Chains connecting the lever with the draw-bar upon a car were broken so that it became necessary for the brakeman to go underneath the platform to uncouple the cars. While a brakeman was so engaged, the conductor, not knowing his position, signaled the engineer to start the train, which he did, thereby causing injury to such brakeman. It was held that the negligence of the conductor in starting the train was the sole cause of the injury, and that the failure to have the chains repaired was not a contributory cause.³

1016. Where machinery was held together by two clamps, which were improper appliances, making the use of the machinery dangerous, and one broke and the engineer continued to use the machinery with but one clamp, which rendered it still more dangerous, and this afterwards broke and injured a workman engaged in the same general business, it was held that the employer was not responsible, as the proximate cause of the injury was the carelessness of the engineer, who was a fellow-servant with the injured man, in running his engine when it was dangerous.⁴

1017. Where an employee was injured by falling into an opening in the floor, and there was evidence tending to show that it was usually covered, and that the covering was re-

¹ *Evansville & T. H. R. Co. v. Tohill*, 143 Ind. 49.

² *McCauly v. Logan*, 152 Pa. St. 202.

³ *Pease, Adm'x, v. C. & N. W. R. Co.*, 61 Wis. 163.

⁴ *Philadelphia Iron & Steel Co. v. Davis*, 111 Pa. St. 597.

moved by such employee's fellow-servant, it was held that, if such was the fact, the plaintiff could not recover from the master.¹

1018. Where an employee was injured by the negligent conduct of his fellow-workman in permitting a crane to suddenly slip out of "slow gear" into "fast gear," thereby breaking the handle of the crank, which had been cracked, and of which the foreman had knowledge, it was held that a nonsuit was proper.²

1019. It was held that the act of a machinist while operating a machine with greasy hands was the proximate cause of a servant's injuries, and not the absence of a catch on the machine, which, had it been present, notwithstanding such act of the machinist, would have prevented the accident.³

1020. The rule was held not to apply where a servant knew the character of the appliance which he operated and was injured solely by the negligence of another employee. The facts were that a conductor was injured while going between cars to arrange a coupling, the car being so constructed that there was not space to permit of a person going between them for that purpose, and the injury was occasioned by the engineer backing the engine without a signal.⁴

1021. The court refused to apply the doctrine, where a miner was injured by the negligence of the engineer at the mine, in a case where it was alleged that the machinery and appliances were defective and such defects contributed to the accident.⁵

1022. An employee was injured while coupling cars having bumpers of unequal height, not so much, however, as to permit one to pass by the other, but which rendered the act

¹ *Hoffman v. Clough*, 124 Pa. St. 505.

² *Barlow v. Standard Steel Casting Co.*, 154 Pa. St. 130.

³ *Sullivan v. Wamsutta Mills*, 155 Mass. 200.

⁴ *Long v. Coronado R. Co.*, 96 Cal. 269.

⁵ *Trewatha v. Buchanan G. M. & M. Co.*, 96 Cal. 494.

of coupling more difficult. The injury was received from the manner in which the cars were forced back by the engineer. It was held that the use of cars with mismatched coupling apparatus was not negligence, but, conceding such to be the case, it was said: It was not the proximate cause of the plaintiff's injury. The mismatched couplings furnished an occasion for uncoupling the cars in a slower way than if they had not been mismatched, but there was no risk of any injury from such delay while the cars were standing still. It was the negligence in driving back the train, and not the mismatched couplings, which was the direct proximate cause of the injury. The failure to have the cars of equal height and the driving back of the train were distinct and independent, and had no connection with each other; the failure to have the cars of equal height being the remote cause, while the act of negligence in driving the train back was the proximate cause, within the meaning of the cases.¹

1023. The fact that plaintiff's decedent, an engineer who was killed in an accident caused by a misplaced switch, was running his engine through a town at a rate of speed prohibited by ordinance, though constituting negligence *per se*, does not bar recovery, where it does not appear that such illegal rate of speed contributed to the accident.²

1024. The negligent act or conduct, in order to charge the master, must be such that a man of ordinary prudence, having the requisite skill or knowledge, where the conditions are such that such skill or knowledge is required, could have reasonably anticipated would have resulted in injury.³

1025. The jury must be instructed that, to justify a verdict for the plaintiff, they must find that the defect or act complained of was the proximate cause of the injury.⁴

¹ *Norfolk & W. R. Co. v. Brown*, 67 Fed. 507; *Martin v. North Star* 91 Va. 668, 22 S. E. 496.

² *L. S. & M. S. R. Co. v. Parker*, 131 Ill. 557, 23 N. E. 237.

v. Minneapolis & St. Louis R. Co., 32 Minn. 331.

³ *Finalyson v. Utica M. & M. Co.*, ⁴ *Avery & Sons v. Meek* (Ky.),

1026. If an injury has resulted from a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury follows as a direct and immediate consequence, the law will refer the damages to the last or proximate cause, and refuse to trace it to that which is remote.¹

1027. The test for drawing the distinction between proximate and remote cause, in reference to the liability for consequences of negligence, is the consideration whether the chain of events was so linked together as a natural whole that the final result was the natural and probable consequence of the wrong-doer's negligent act.²

1028. Proximate cause is ordinarily a matter for the jury; but where the facts are not in dispute, it is for the court to determine whether or not an injury was the natural and proximate consequence of the negligence complained of — a consequence likely to flow from the negligent act.³

1029. Where an employee was injured by smoke in a tunnel while he was working in such tunnel under the direction of his superior, it was held that, as there was a total failure of evidence to show that the smoke in the tunnel when the employee entered it was dangerous to human life, or to show that defendant could have anticipated a condition of the tunnel dangerous to human life, plaintiff could not recover.⁴

1030. The negligence is not the proximate cause of the accident, unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence.

28 S. W. 337; *Fordyce et al. v. Yarbrough*, 1 Tex. App. 260, 21 S. W. 421; *Campbell v. Wing*, 5 Tex. App. 431, 24 S. W. 360.

² *Haverly v. Railroad Co.*, 135 Pa. St. 50.

³ *Bunting v. Hogsett*, 139 Pa. St. 363.

¹ *Cooley on Torts*, p. 73; *Pease v. Railroad Co.*, 61 Wis. 163, 20 N. W. 908; *Norfolk & W. R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496.

⁴ *O'Malley v. Missouri Pac. R. Co.*, 113 Mo. 319.

A mere failure to ward against a result which could not have been reasonably expected is not actionable negligence. It is not, however, necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence.

The rule was applied to an employee of an electric light company, while climbing a pole of such company, coming in contact with a span-wire fastened to an iron post of the defendant company supporting its trolley-wire, where the plaintiff was experienced and knew the danger.¹

1031. Negligence is the proximate cause of injury only when it is of such character as that men of ordinary prudence, judgment and experience ought reasonably, in the light of the attending circumstances, to have foreseen such an accident as likely to occur.²

1032. Where a brakeman was injured by falling between cars which became detached by reason of the breaking of a coupling-pin which was defective, and it appeared that the brakeman's place of duty at the time, as required by the rules, was at the side of the train on the ground, but that he had assumed a position on top of the car, intending to set a brake which seemed to be required by the exigencies of the case, it was held that even if his position was in violation of the rules, that would not prevent a recovery. That the proximate cause of the injury was the breaking of a defective coupling-pin. His being in an improper place was a mere condition of the injury.³

1033. It was said in this case that it could not be held as matter of law that the neglect of an engineer to obey a danger signal by reason of a conductor signaling him to pro-

¹Huber v. La Crosse City R. Co. Lumber Co., 91 Wis. 637, 65 N. W. (Wis.), 66 N. W. 708. 374.

²Klatt v. N. C. Foster Lumber Co. (Wis.), 66 N. W. 791; McGowan v. C. & N. W. R. Co., 91 Wis. 147, 64 N. W. 891; Kucera v. Merrill ³Terre Haute & I. R. Co. v. Mansberger, 65 Fed. 196 (C. C. A.). See, also, Phillips v. Railway Co., 64 Wis. 475.

ceed interrupted the sequence between the negligence of the conductor in ordering the train ahead and the injury complained of, which was occasioned by the train going through a bridge, and the question was properly left to the jury. The opinion in this case is a very able discussion of the principles which underlie the doctrine of proximate cause.¹

1034. The fact that the conductor and engineer of a train, moving slowly in a switch yard, were both off the train, was held not to constitute negligence as to a yard employee who by reason of the spreading of the rails was struck and killed by a lever used by a switchman to shift the cars from one track to another. The fireman and brakeman were left in charge of the train, being competent to manage it, and there being no negligence on their part the company was not liable.²

1035. Where the cup of a lantern used by a brakeman fell out, necessitating the obtaining of another, which he did, and while ascending the car with the new light he came in contact with a permanent structure close to the track and was killed, it was held that there was nothing to show that the want of proper care on the part of the company in respect to the appliance was the proximate cause of the injury.³

1036. A brakeman who had been sent back to signal an approaching train in the night-time was injured. In getting out of the way of the train his foot caught in the splinters of a defective rail, and in attempting to extricate his foot his hand was pierced by a splinter, which held it until the approaching train ran over it. The negligence charged was that the train was running without a head-light. The court said that the absence of a head-light in no way contributed to the injury.⁴

1037. Where a railroad fireman was injured by the tender of an engine leaving the track, and it was sought to charge

¹ Union Pac. R. Co. v. Callaghan, 56 Fed. 988 (C. C. A.).

³ Davis v. Columbia, etc. R. Co., 21 S. C. 93.

² Louisville, etc. R. Co. v. Coniff's Adm'r, 90 Ky. 560, 14 S. W. 543.

⁴ Glenn v. Columbia, etc. R. Co., 21 S. C. 466.

the railroad company with negligence which caused the accident, and, to sustain the charge, evidence was received tending to show that the rails were not properly spiked at other places, and also at the place in question, it was held that such evidence was improper and immaterial, because it was apparent that the track did not spread at the place where the tender left the track.¹

1038. Where an engineer, while his engine was leaving the track, reversed his engine, the lever striking him upon the arm and breaking it, and it appeared the defective condition of the track was the cause of his engine leaving the track, it was held that the defective condition of the track was the proximate cause of such employee's injury.²

1039. It was held, where an employee was injured in the act of coupling cars, and it appeared the draw-heads were not perfectly matched, and, not being able to accomplish the feat at the first attempt, he moved along with the cars and caught his foot in a frog and was injured, that although the company had failed to furnish cars that would couple readily, its failure was not the proximate cause of the injury.³

1040. Where a young boy was taken from his work and placed to drive a mule attached to a car in a mine, and the evidence disclosed that the mule was vicious, and further that at a point where the boy was to detach the mule from the car, which was moving down an incline, the mule started up, drawing the boy into a position where his hands came under the wheels of the car, it was held that there was no evidence of negligence on the part of the operators of the mine. It did not appear that the viciousness of the animal had ought to do in causing the accident; that he merely started and stopped at the command, Whoa!⁴

1041. Where an employee in a mine was killed by the negligent act of another employee in signaling for the start-

¹ Kuhns, Adm'r, v. Wis., I. & N. R. Co., 70 Iowa, 561.

³ Williams v. Central R. R. Co. of Iowa, 43 Iowa, 396.

² Knapp v. Sioux City & Pac. R. Co., 65 Iowa, 91; Same Case, 71 Iowa, 41.

⁴ Pittston Coal Co. v. McNulty, 120 Pa. St. 414.

ing of the cage, it was held error to admit testimony showing the dangerous inadequacy of the machinery and appliances for the operation of the mine, and that a less dangerous system of appliances might have been adopted, and improvements introduced to lessen the danger, and to show a want of compliance with statutory requirements. They tend to present false issues, prejudicial to the defendant.¹

1042. Where an engineer, in violation of the rules of the company, temporarily left his engine, and while thus absent from his post of duty the fireman, who was inexperienced, either intentionally or inadvertently moved the engine, resulting in injury to another employee, upon the question whether the neglect of the engineer was the proximate cause of the injury, or the act of the fireman was an independent intervening cause, it was said: The act of a third person intervening and contributing a condition necessary to the injury, its effect on the original negligence will not excuse the first wrong-doer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies that might arise. Whether in any given case the act charged was negligent, and whether the injury suffered was within the relation of cause and effect legally attributable to it, are questions for the jury. Whether it ought to have been foreseen that an ignorant fireman might intentionally or inadvertently put the engine in motion, when under steam as it was, if the engineer left the post assigned to him by his employer, was a question for the jury. An engine under steam is too nearly a thing of life to be left in the hands of a person ignorant of its workings and mechanism, and if injury results from negligence, even though there may have been an intervening act directly contributing to the injury, no court would be justified in holding that, in the ordinary

¹ *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267, 38 Pac. 596.

course of events, such intervention ought not to have been anticipated, or at least thought likely to occur.¹

1043. Where a water-cask, placed on the front end of a hand-car by some of the crew of section-men, was jolted off the car, causing the overturning of the car and injury to one of the crew, it was held that though the looseness of the car-handles caused the car to jolt, and though the foreman had promised to have this fixed, a verdict was properly directed for the defendant, the accident having resulted from the intervention of a new and distinct cause, the negligent placing of the cask by the plaintiff's fellow-servants.²

1044. *Quære*, whether, if defendant's negligence was not the primary cause of the accident, a defect in the machinery, which as a secondary cause might have aided in producing the injury, could be regarded as actionable negligence. The question was, where the action of a servant produces the breaking of machinery which caused injury to the plaintiff, but which would not have produced the injury but for such breaking, whether such instance was sufficient to establish negligence on the part of the employer. The court stated that it was very doubtful.³

1045. Where it was charged by a brakeman that the injuries which he received while coupling cars were owing to the fact that the draught-irons of the cars were of different heights, and it appeared that the link was adjusted without difficulty between the two, and that his hand was crushed between the draw-bars, and the injury would have been sustained even though the draw-bars were of even height, it was held that it could not be said that the condition of the draw-bars with respect to each other was the cause of the plaintiff's injuries.⁴

1046. It was held upon the facts that the danger to the plaintiff was one which the defendant could not have

¹ Mexican Nat. R. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075.

² Rose v. Gulf, C. & S. F. R. Co. (Tex.), 17 S. W. 789.

³ Bibby v. Wausau Lumber Co., 80 Wis. 367.

⁴ Kruse v. C., M. & St. P. R. Co., 82 Wis. 568.

reasonably anticipated and therefore could not be held liable.¹

1047. Where an elevator was not defective, but was arranged in the building so as to be dangerous to an inexperienced person by reason of the check-lines being placed so near the table that by inadvertence one would be mistaken for the other, and a young boy, employed to operate it, with only four days' experience, was injured, it was held that the unsafe condition of such appliance was the proximate cause of his injuries.²

¹Porter v. Silver Creek & M. C. R. Co., 84 Wis. 418.

²Thompson v. Johnston Bros. Co., 86 Wis. 576.

CHAPTER V.

CONTRACTS LIMITING LIABILITY.

A. *General Doctrine*, 1048 et seq.

B. *Statutes Restricting*, 1063 et seq.

Iowa, 1063.

Massachusetts, 1064.

Minnesota, 1065.

Mississippi, 1065a.

Ohio, 1065b.

Texas, 1066.

Wisconsin, 1067.

Wyoming, 1068.

A. *General Doctrine.*

1048. A rule of the defendant company provided in substance that the conditions of the employment by the company are that the regular compensation paid for the services of the employees shall cover all risks incurred and liability to accident or other cause. The right to claim compensation for injuries will not be recognized. It was held that a rule which imposes upon an employee to look after and be responsible for his own safety contravenes the law itself which fixes the liability of railroad companies for negligence causing injury or death to their employees.¹

1049. A rule of the defendant company provided that all persons entering or remaining in the service of the company are warned that, in accepting or retaining employment, they must assume the ordinary risks attending it. Each employee is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains. It was held that

¹ *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276.

railroads, like other corporations and persons, have the right to adopt reasonable rules and regulations for the government of their employees and for their own protection; but they cannot stipulate for immunity from liability for their own wrongful negligence. A rule which imposes upon an employee to look after and be responsible for his own safety contravenes the law itself, which fixes the liability of railroads for negligence causing injury or death to their employees.¹

1050. The Alabama code (sec. 2590, subd. 5) makes an employer liable to an employee for personal injuries resulting from the negligence of any person in the employer's service, who has charge of or control of any car, engine or train upon a railway, or any part of the track of a railway.

A rule of the defendant company provided that the regular compensation paid for the services of an employee shall cover all risks incurred and liability to accident from any cause whatever. If an employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized.

It was held that such a rule or stipulation, being in contravention of the statutory provisions, is opposed to public policy, and does not avail to secure non-liability for an injury caused to an employee by defendant's own negligence or misconduct in the cases specified in the statute.²

1051. A railroad company cannot contract in advance with its employees for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in the state of Kansas by chapter 93, Laws of 1874, and a contract in contravention of this statute is void, and no defense to an action brought by an employee of a railroad company for damages done to him in consequence of the negligence or mismanagement of a company.³

¹ Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 So. 360.

³ Kansas Pac. R. Co. v. Peavey, 29 Kan. 169.

² Hissong v. Richmond & D. R. Co., 91 Ala. 514, 8 So. 776.

1052. Where the defendant railroad company contracted with a firm of contractors to remove a certain granite bluff, and among other things it was stipulated by the company that it should in no way be held responsible for any injury to, or the death of, any of the members of the said firm, or any of its agents and employees, sustained from said work, should such injury or death occur from any cause whatsoever, and one of the members of the said firm was killed through the alleged negligence of the defendant, and the stipulation was urged as a defense, it was said: It would be strange indeed if such a doctrine could be maintained. To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never lawfully be done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled in this court than that a common carrier cannot, by contract, exempt himself from responsibility for his own or his servant's negligence in the carrying of goods or passengers for hire.

The principle is not confined to the contracts of carriers as such; it applies universally.¹

1053. Where the question before the court was as to the effect of the provisions of a contract, waiving claims for damages by a passenger riding upon a pass, upon a railroad company, it being held that such contract was not a defense against the negligence of the defendant, whereby injury was caused to such passenger, it was said: The language of the statute is so broad that it includes any and all persons, employees as well as others, who may be injured in consequence of the negligence of the agents or servants of the railroad company, or persons operating the same.

The statute (sec. 7, ch. 169, Laws of 1862; sec. 1, ch. 121, Laws of 1870; Code, sec. 1307) reads as follows, viz.:

“Every railroad company shall be liable for all damages

¹ Johnson's *Adm'x v. Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. 829.

sustained by any person, including employees of the company, in consequence of any neglect of the agents, or by mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage, all contracts to the contrary notwithstanding.”¹

1054. The liability of railroad companies for injuries caused to their servants by the carelessness of other employees who are placed in authority and control over them is founded upon considerations of public policy, and it is not competent for a railroad company to stipulate with its employees at the time and as part of their contract of employment that such liability shall not attach to it.²

1055. A written contract entered into by an employee at the time he was employed, whereby he took upon himself the risks incident to his employment, and agreed that he would in no case hold the company responsible for any damage he might sustain by accident or collisions, or which might result from the negligence or carelessness or misconduct of himself or other employees, was, in so far as it did not waive any criminal neglect of the company or its principal officers, a legal contract and binding upon the employee.³

1056. Where a rule provided that the conditions of employment by the company are that the regular compensation paid for the services of employees shall cover all risks incurred and liability to accident from any cause whatever while in the service of the company; if an employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized,—it was said: If an express contract to this effect had been made by the employee, who was injured, under the common law it is likely he would be bound by it, but inasmuch as he made no express contract he was not bound by it.

¹ *Rose v. Des Moines Valley R. Co.*, Bishop, 50 Ga. 465; *Western & Atlantic R. Co. v. Strong*, 52 Ga. 461; 39 Iowa, 246.

² *Railway Co. v. Spangler*, 44 Ohio St. 471. *Galloway v. Western & A. R. Co.*, 57 Ga. 512; *Cook v. Railway Co.*, 57 Ga. 512.

³ *Western & Atlantic R. Co. v.* 72 Ga. 48.

The court recognizes the right of the company to make all needful rules for the government of its employees, and regulating the manner of performing their duties, and declares that such rules, when known to the employee, or he has been furnished with a book containing them, whether he knows them or not, are binding upon him. But where a rule requires an employee to waive certain rights which are not connected with his duty as an employee, then it does not bind him, although he has knowledge of it, unless he has expressly agreed thereto. The fact that he kept the rules in his possession and remained in the service of the company would not bar his right to recover unless he expressly agreed to that particular rule.¹

1057. A stipulation in a contract of employment requiring the brakeman not to attempt to couple cars unless he knows the coupling is in proper condition will not bind the employee, so as to require him to perform the master's duty of seeing that the appliances are in proper condition.²

1058. Where the employee of a railroad company has agreed to assume all risks incident to his employment, the fact that he is running over another railroad at the time of the injury does not relieve him from such agreement.³

1059. The previous decisions of the Georgia court are reviewed. The court declined to overrule them, but on the contrary affirmed the same, so far as they are unmodified by the statute (sec. 4586, Code of 1876). The cases of *Railway Co. v. Beatie*, 66 Ga. 438, and *Railway Co. v. Gunn*, 68 Ga. 250, are distinguished on the ground that they relate to contracts, not between employer and employee, but between common carrier and consignor, and consequently do not overrule or in any way affect the cases under review.

It was held that the terms of the contract, "He further agrees that he will take upon himself all risks connected

¹Georgia Pac. R. Co. v. Dooley, 86 Ga. 294, 12 S. E. 923.

³Galloway v. Western, etc. R. Co., 57 Ga. 512.

²Missouri, K. & T. R. Co. v. Wood (Tex. App.), 35 S. W. 879.

with or incident to the employment, and will in no case hold the company liable for any injury or damage to his person or otherwise he may sustain while thus employed, whether it arises from explosion, or the machinery, or accident, or negligence, or misconduct of himself or any other person employed by the company, or from any other cause," were intended by the parties to cover all negligence, including that of the employer in failing to keep the machinery in safe condition, and in omitting to have it properly inspected to ascertain its condition.¹

1060. A contract provided that a servant having been employed at his request by the defendant railroad company in the capacity of brakeman, he agreed with said railway, in consideration of such employment, that he would take upon himself all risks incident to his position on the road, and would in no case hold the company liable for any injury or damage he may sustain in his person or otherwise, by accidents or collisions on the trains or road, or which may result from defective machinery or carelessness or misconduct of himself or any other employee and servant of the company.

It was said by the court that a common carrier could not pre-contract with its customers so as to relieve itself from liability for its own negligent acts, but that the contract in question was not affected by the same considerations, that is, on grounds of public employment, as the relation existing between the parties was essentially a private relation, namely, that of master and servant. The negligence of a fellow-servant is not in fact and in morals the negligence of the master; hence a stipulation not to be answerable for their negligence beyond the selection of competent servants in the first instance, and the discharge of such as prove to be reckless or incompetent, might be held as reasonable, notwithstanding a statute might abolish the old rule of non-liability for the acts and omissions of a co-servant. It is an

¹ *Fulton Bag & Cotton Co. v. Wilson*, 89 Ga. 318, 15 S. E. 322.

elementary principle in the law of contracts that "*modus et conventio vincunt legem*" — the form of agreement and the convention of parties override the law. Yet parties can only contract to make a law for themselves where their agreements do not violate the express provisions of any law nor injuriously affect the interests of the public. By the constitution and laws of Arkansas, railroads operated in the state are responsible for damages to all persons and property done by the running of trains. This means only in case of negligence, and under these provisions it is doubtful if liability can be avoided by contract in advance.

The court, however, preferred to rest their decision on the ground of public policy, and as it is the duty of employers to furnish reasonably safe appliances and places to work for their servants' use, and this duty is one of public interest, they cannot by contract absolve themselves from its performance or relieve themselves from liability for the consequences of their neglect in these respects by a contract in advance.¹

1061. In England, under the employers' liability act of 1886, it has been held that the servant may by express contract preclude himself from taking advantage of the provisions of the act, and may also by such contract preclude his widow from claiming such benefits in case of his death.

It was said by the judge delivering the opinion: "I think the court should take a broad view of the construction of the law, having regard to the intent of the legislature. I do not think the words of the act go far enough to compel the construction that the express contract by a workman against the operation of the act should not take effect. In all cases referred to in argument, where the legislature has intended to enact that a party shall not be allowed to contract himself out of an act of parliament, very express words have been used. As a general rule entire freedom of contract has been preserved; it has only been interfered with in order to obviate great public injustice. It is legitimate to see what

¹Little Rock & Ft. S. R. Co. v. Eubanks, 48 Ark. 460, 3 S. W. 808.

would be the consequence if the construction contended for by plaintiff's counsel prevailed, because if injustice would result it is unlikely that the legislature intended that construction. I think great injustice would result, because the workman might obtain the benefit of the contract for years in the form of higher wages to cover the risk of injury, and then claim additional compensation when he was injured."¹

1062. While an employee of a railroad company was in its service he executed a contract releasing the company from any liability for injury to him by reason of the negligence of the company, its agents, servants or employees. The consideration expressed was the employment and the compensation agreed to be paid therefor.

It was held that the release was without consideration and was void. The court say, in thus deciding: We do not intimate that if the defendant had given some kind of consideration it would have been valid. It might even then be urged that public policy forbids the enactment of such contracts, and upon that question we desire to express no opinion.²

B. Statutes Restricting.

1063. Iowa.—It is provided that no contract which restricts the liability of railroad companies under the statute shall be legal and binding.³

1064. Massachusetts.—No person or corporation shall, by a special contract with persons in its employ, exempt him or itself from any liability which he or it might otherwise be under to such person for injuries suffered by them in their employment, and which result from the employer's own negligence or from the negligence of other persons in his or its employ.⁴

¹ Griffith v. Earl of Dudley, L. R. 10 Q. B. Div. 357.

³ Code, sec. 1307.

² Purdy v. Rome, W. & O. R. Co., 125 N. Y. 209.

⁴ Public Laws Mass., 422, sec. 3, ch. 74.

1065. Minnesota.—It is provided that no contract, rule or regulation between railroad corporations and its agents or servants shall impair or diminish the liability of the former in cases under the statute.¹

1065a. Mississippi.— See 2180.

1065b. Ohio.— See 2217.

1066. Texas.— Contracts on contingency of injury or death of employees, limiting the liability of the employer for such death, or fixing damages to be recovered, are declared invalid and not binding on the employee.²

1067. Wisconsin.— It is provided that no contract, receipt, rule or regulation between any employee and a railroad company shall exempt such corporation from the full liability imposed by the act.³

1068. Wyoming.— It shall be unlawful for any person, company or corporation to require of its employees, as a condition of their employment, any contract whereby the employer shall be released or discharged from liability or responsibility on account of personal injuries received by such servant or employee by reason of the negligence of the employer.⁴

1068a. That part of the Ohio statute of 1890 which provides that “no railroad company, insurance company or association or other person shall demand, expect, require or enter into any contract, agreement or stipulation with any other person about to enter or in the employment of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company thereafter arising from personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same, any other right whatsoever, and all such stipulations or agreements shall be void,” was held to be invalid and unconstitutional. It was not only held to be class legislation, but that in denying to employees the right to make their own contracts concerning their own labor, it

¹ Ch. 13, Laws of 1887.

³ Ch. 220, Laws of 1893.

² Laws of 1891, ch. 24, p. 25, sec. 2.

⁴ Laws of 1890–91, ch. 28, p. 141.

deprived them of liberty and the right to exercise the privileges of manhood without due process of law.¹

NOTE.—The writer had occasion to discuss similar acts of legislation in his treatise on Master's Liability for Injuries to Servant, page 477 et seq., and reached the conclusion that such legislation was not only vicious but of no force; that the doctrine of assumption of the risk of injury from the negligence of fellow-servants was founded upon public policy, and so declared; that it entered into the contract of employment as a part thereof, and legislatures could not prohibit the making of contracts that in no way contravened public policy, much less contracts which in terms expressed that which public policy implied at common law.

1068b. The legislature of Missouri on March 6, 1893, passed an act making it unlawful for an employer to prohibit an employee from joining, or requiring an employee to withdraw from, a trade or labor union or other lawful organization, providing a penalty for violation of the provisions of the act. The supreme court of that state held this act to be in violation of the fifth amendment of the constitution of the United States and of the second article of the constitution, declaring "that no one shall be deprived of life, liberty or property without due process of law." Also that the act was unconstitutional as being special legislation. The court further held that to deny a citizen the right to make free and valid contracts for his labor was to deprive him of liberty without due process of law.²

1069. A parent or one standing *in loco parentis* to a minor cannot contract so as to exempt the latter's employer from responsibility to the minor for permanent injuries inflicted upon him.³

¹ Shaver v. Pennsylvania Co., 71 Fed. 931. For statute, see 2217.

³ International & G. N. R. Co. v. Hinzie, 82 Tex. 623, 18 S. W. 681.

² State v. Julow, 129 Mo. 163, 81 S. W. 781.

CHAPTER VI.

CONTRACTS RELEASING CLAIMS.

- A. *Generally — Their Character and Effect — Fraud*, 1070 et seq.
- B. *Mutual Mistake*, 1083 et seq.
- C. *Failure to Read or Understand*, 1084 et seq.
- D. *Absence of Counsel*, 1100.
- E. *Insurance Contracts Stipulating Release*, 1101 et seq.
- F. *Return of the Consideration*, 1106 et seq.

A. *Generally — Their Character and Effect — Fraud.*

1070. Where an employee receives and retains money from the employer on the faith of his statement that he would not sue for damages for personal injuries, he is estopped from bringing an action.¹

1071. Where a release is general in its terms, and there is no limitation by way of recital or otherwise, the releasor may not prove an exception by parol. The instrument itself is the only competent evidence of the agreement of the parties, unless avoided for fraud, mistake, duress or some other cause.

Where, however, a general release is pleaded as an affirmative defense to a cause of action, plaintiff may show that by a mutual mistake of parties, or a mistake on his part and fraud on the part of the defendant, the cause of action was included in the release, contrary to the agreement and intent of the parties, or, in case of fraud, contrary to his intent.

The intentional concealment by the releasee of a cause of action existing in favor of the releasor, of which he was ignorant, will be sufficient to estop the former from insisting upon any advantage to be derived from the mistake of the latter.

¹ Galloway v. Western, etc. R. Co., 57 Ga. 512.

Whatever proofs would be regarded as sufficient to enable the plaintiff to maintain an action for the reformation of the release, so as to except from its provisions the demand in suit, would be available to him in this action by way of avoidance of its terms.¹

1072. Where a written paper acknowledging the receipt of a sum of money contains an agreement that the money is received in full payment of all demands for damages sustained, it cannot be varied or controlled by evidence of an oral agreement made contemporaneously with it and inconsistent with its terms. It was accordingly held, where such a release was executed, releasing all claims for personal injuries, that oral evidence was inadmissible, in the absence of fraud, to show that the plaintiff understood that the sum paid was intended as a settlement for the damages to his property only, and that it was agreed between the parties that if it appeared that he been injured in his person he should be paid something more.

A mistake or misunderstanding on the part of the plaintiff of the legal import of a written agreement is not a ground for avoiding it at common law.²

1073. A release for settlement of claim for certain personal injuries specified in the release, "and also of and from all manner of actions, causes of action, claims and demands from the beginning of the world to this day," was held not to cover personal injuries not therein specified, and not known to exist at the time the release was executed.

Since the general terms in the release were limited by preceding specifications, the rule is that, when there is a particular recital, followed by general words, the latter are qualified by the particular recital.³

¹ *Kirchner v. N. H. S. M. Co.*, 135 Minn. 350, 31 N. W. 449; *Wheaton v. Fay et al.*, 62 N. Y. 275; *Germania Ins. Co. v. Railroad Co.*, 72 N. Y. 90.

² *Squires v. Amherst*, 145 Mass. 192; *Brown v. City of Cambridge*, 3 Allen, 474; *Pratt v. Castle*, 91 Mich. 484; *Cummings v. Baars*, 36 Fed. 365 (C. C. A.).

³ *Union Pac. R. Co. v. Artist*, 60 Fed. 365 (C. C. A.).

1074. In the federal courts, in an action at law to recover damages for personal injuries, a release intentionally executed by plaintiff for a money consideration, he knowing the legal effect thereof, cannot be attacked, or its effect as a complete bar avoided, by showing that plaintiff was induced to sign it by the misrepresentations of the surgeon who attended him as to the permanent character of his injuries. The action may be suspended while the plaintiff brings an independent suit in equity to rescind the release for fraud.¹

1075. Where a release was duly executed under seal, in a state which makes a seal presumptive evidence of consideration, and it appeared that no consideration was in fact paid or employment given, it was held that it is proper to disregard such release.²

1076. A release by an employee of his master from liability for a personal injury, in consideration of employment for such time as might be satisfactory to the master and not longer, was held not to express a consideration and was therefore without force.³

1077. One injured while in defendant's employ is barred from commencing suit for damages against the employer, after having given the employer a release in writing in consideration of the latter's promise to pay him a certain sum monthly for a period named, and also his physician's bills, which promise has been performed.⁴ •

1078. A release will not be set aside on the ground of fraud without the strongest proof. A release for personal injuries will not be set aside on the ground of fraud and mistake, when it appears that the plaintiff, after his injuries, was kept in a hospital at defendant's expense for six months; that while there he signed the release, which three witnesses testify was read and explained to him, though he testified

¹ Vandervelden v. C. & N. W. R. Co., 61 Fed. 54.

² Wabash & Western R. Co. v. Brow, 65 Fed. 941 (C. C. A.).

³ Gulf, C. & S. F. R. Co. v. Winton, 7 Tex. App. 57, 26 S. W. 770.

⁴ Jennings v. City of Ft. Worth, 7 Tex. App. 329, 26 S. W. 927.

that he thought he was signing some hospital regulations; that the paper he signed was not the one read to him, and also that he never asked or knew who was paying the hospital expenses.¹

1079. Where the consideration expressed in a release was the receipt of \$100, in full settlement of all claims growing out of the accident to him, and the agreement by defendant to furnish him with a good and serviceable artificial limb, it was held that the presumption was conclusive that the plaintiff understood the contract as written and is bound by it, unless he sustains a plea of mistake by the weight of evidence. An instruction throwing the burden of proof on defendant to show the plaintiff understood and fully assented to the writing was error.²

1080. Where there was evidence that the employee and employer had agreed upon a certain amount as damages in settlement of his claim for injuries received, and the employer promised to make out a voucher for it and have it passed through the records of the company, when it would be paid, with which arrangement the employee expressed himself satisfied, and the voucher was made the same day, and soon thereafter the amount agreed upon was tendered, it was held error to instruct that, in order to sustain the defense of accord and satisfaction, it must be shown that the agreement to accept has been fully executed, and that the thing to be taken has been accepted and received.

The true distinction (citing *Chitty on Contracts*, 1124) was said to be between the cases in which the plaintiff has agreed to accept the promise of the defendant in satisfaction, and those in which he has agreed to accept the performance of such promise in satisfaction; that in the latter case there shall be no satisfaction without the performance, while in the former, if the promise be not performed, the plaintiff's

¹ *Pederson v. Seattle Consolidated St. Ry. Co.*, 6 Wash. 202, 33 Pac. 351; *Pennsylvania Co. v. Shay*, 82 Pa. St. 198; *Rose v. West Phil. R. Co. (Pa. St.)*, 12 Atl. 78.
² *Addyston Pipe & Steel Co. v. Copple*, 94 Ky. 292, 22 S. W. 323.

only remedy is by action for breach thereof, and he has no right to recur to the original demand.¹

1081. An employee brought an action against the employer to recover for the breach of an alleged contract by the terms of which the defendant was to pay him the sum of \$100 and to furnish him permanent employment, and as a part consideration he executed a written release discharging the employer from all liability on account of injury received through the alleged negligence of the latter. It was held: 1st. That the action was of contract and not of tort. 2d. That the parol promise to re-employ the plaintiff was a sufficient consideration for the release. 3d. That the agreement imposed upon the defendant the duty of employing plaintiff as long as he was able, ready and willing to perform such service as it may have for him to perform, and therefore was not void for uncertainty. 4th. The contract was not void as against public policy. 5th. It was not void for want of mutuality. 6th. The fact that the agreement was verbal did not make it void under the provisions of the statute of frauds relating to agreements not to be performed within one year, as such provisions do not apply to contracts for personal services, which may terminate with the death of the party. 7th. The fact that the written release recites the consideration as \$100 does not prevent it being shown that the oral agreement to furnish employment also formed a part of the consideration, it being merely collateral to the release.²

1082. Where a railroad company negligently inflicts personal injury on one of its employees, and thereupon he has been treated for the injury by its surgeon, a payment made by the company to the surgeon, even at the employee's request, does not constitute a consideration for a release, by such employee, of his claim for damages occasioned by the injury, as the company is liable for such expenses of treatment.³

¹ *Gulf, C. & S. F. R. Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556.

³ *Richmond & D. R. Co. v. Walker*, 92 Ga. 485, 17 S. E. 604.

² *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802.

B. *Mutual Mistake.*

1083. While the plaintiff was suffering from injuries received in a collision, an agent of the company procured him, in consideration of \$50, to execute a release under seal of all claims against the defendant by reason of his property being destroyed at the time of the collision and also for personal injuries received at the time. The jury found that the subject of a release for personal injuries was not talked of during their negotiations, and that neither the plaintiff nor the agent understood the release covered the claim for such injury. The value of the property destroyed exceeded \$50. It was held that the courts would relieve against mistake as well as fraud.

The further question was present, whether the ignorance of the plaintiff of the clause contained in the instrument "releasing all claims of personal injury" precluded him from avoiding it. It appeared that the plaintiff was sick in bed suffering from an injury. He was conscious and rational, and his recollection of events was clear, but the interview was quite brief, and it was said by the court: "It is a fair inference that the plaintiff was in no condition to read and fully comprehend the release." He was dizzy.

It was said that under these circumstances the ignorance of the plaintiff of the contents of the release cannot be said to be the result of the want of such diligence on his part as to preclude him from the right to avoid it.¹

C. *Failure to Read or Understand.*

1084. A release is not impeached merely because the releasor could not read or understand its contents, since his signing in such a case raises the presumption of gross negligence, which he has the burden to disprove.

Plaintiff testified that defendant's agents informed him while in bed that they had come to pay him four months' wages at \$1.50 per day, and some doctor bills. That he did

¹Lusted v. C. & N. W. R. Co., 71 Wis. 391.

not read the paper; that he could not read, and don't know whether they read it to him or not; that he did not understand the contents of the paper; did not know it discharged the company from all liability to pay him for his injuries, and that if he had so known he would not have signed it. Afterwards he drew two months' wages which had not been paid, and which was no part of the \$225 paid to him; that he was a German and did not understand the meaning of "liability" or "discharge" or "consideration" or "employer" or "employee," and those words were not explained to him. The defendant's agents in substance disputed this testimony of the plaintiff as to what was said, and testified that they read it over to him slowly, and figured with him as to about the time he would be probably be laid up with his injuries.

The court submitted the question as to whether he knew the contents of the paper when he signed it; that it was a settlement of the case,—instructing the jury that if he did, he was bound by it; if not, then they must answer accordingly.

It was said that the effect of the instruction was that the plaintiff might avoid the effect of the release by merely showing that at the time he signed it he did not know its contents or effect. Written instruments regularly executed and delivered cannot be thus dealt with and avoided, and their operation defeated. There is no pretense that the plaintiff was induced to sign the release through fraud or misrepresentation, or that any deception was practiced by misreading it to him. His inability to read English and understand the contents of the paper is not an excuse. This was his own negligence. He could and should have sought the assistance of some one capable of properly informing him. It cannot be tolerated that a man shall execute a written instrument, and, when called upon to abide its terms, say merely that he did not read it or know what it contained.¹

¹ *Albrecht v. Mil. & S. R. Co.*, 87 Wis. 105, 58 N. W. 72, citing *Upton v. Tribilcock*, 91 U. S. 45.

1085. An agent of the defendant, after the plaintiff had received his injuries, the subject of the action, paid him \$250, and persuaded him to sign a release discharging the defendant from any further liability. Only the plaintiff and his wife were present. Neither of them could write or read in the English language. The effect of their testimony was that such agent proposed to pay this sum as wages for four months. That they so understood it, and supposed that the paper was a receipt for wages. It was admitted that the agent would testify that there was no misrepresentation, and that the release was read and fully explained to the plaintiff. It was held that an issue of fraud was thus presented proper for the determination of the jury.¹

1086. Where a release was executed upon the consideration that the railroad company would pay the funeral expenses of the plaintiff's son who had been killed, and the plaintiff afterwards brought a suit and claimed that he had not read the release, and that he understood that it was merely a receipt for the funeral expenses paid by the company, and it appeared by the testimony of defendant's agent that the release was read and explained to the plaintiff, it was held that the case should have been withdrawn from the jury. That it is error to submit a question of fraud to a jury to overturn a written instrument upon slight parol evidence. The evidence of fraud must be clear, precise and indubitable.²

1087. Where the plaintiff testified that he did not know, when he signed a release of claim for personal injuries, what he was signing,—in other words, that misrepresentations were made to him,—and that he did not know that he was giving up his rights to a certain portion of the claim, it was held that an instruction was correct which stated that the release was not to be set aside upon any but the strongest and clearest testimony; that to infer fraud from anything but the strongest and most satisfactory proof is to infer a crim-

¹*Sobieski v. St. Paul & Duluth* ²*Pennsylvania R. Co. v. Shay*, 82 R. Co., 41 Minn. 169, 42 N. W. 863. Pa. St. 198.

inal thought and disposition in a man, which is against the presumption of law.¹

1088. Where a plaintiff sought to avoid a release on the ground that it was not read to him; that he could not read English, and that he believed he was signing a receipt, and it appeared he did not request to have the paper read, nor did he ask what it was, nor mention that he could not read English, but signed it without knowing its contents, it was held that there was no evidence to show that the release was obtained by fraud.²

1089. An employee who had been injured in the service of the defendant company testified that he had agreed with the claim agent to receive \$300 for his loss of time and towards getting an artificial foot. The voucher which he signed was presented to him folded, so as to show only a receipt for the above account. He signed the receipt without reading the voucher, relying upon the agent's representations that the settlement was only for time lost. There was testimony on the part of the defendant to the effect that there was a full settlement of all claims, and the paper was in effect a full release. It was held that the jury were justified in finding that the release was procured by fraud and was not binding.³

1090. Where plaintiff's reply denied the execution of the release, and alleged that when it was executed he was under the impression that it was a receipt for wages due him, and that he was unable to comprehend the purport of the release by reason of the bodily pain and mental anxiety he was then suffering in consequence of his injuries, it was held that, though there were no allegations of fraud, the reply showed matter sufficient to invalidate the alleged release. (The facts are not given.)⁴

¹Rose v. West Phil. R. Co. (Pa. St.), 12 Atl. 78. See, also, Parlin v. Small, 68 Me. 289; Gruber v. Baker, 20 Nev. 453, 23 Pac. 858.

³Mateer v. Missouri Pac. R. Co., 105 Mo. 320, 15 S. W. 970.

⁴Bean v. Western N. C. R. Co., 107 N. C. 731, 12 S. E. 600.

²Spitze v. Balt. & Ohio R. Co., 75 Md. 163, 23 Atl. 307.

1091. Where an employee, a conductor, had the capacity to read the release signed by him, and had an opportunity to do so, and no fraud was practiced upon him to prevent him from reading it, but he chose to rely upon what another said about it, it was held that he was estopped by his own negligence from claiming that it was not legal and binding upon him according to its terms.

To establish fraud the plaintiff testified, in substance, that when he signed the papers they were not read over to him; that the agent stated to him that they were orders for his back pay and that he had no knowledge of the contents of the papers. It was held that he was not excused under the circumstances from reading the paper himself, and not to do so was negligence.¹

1092. Where one negligently signs a written contract, without taking the precaution to read it or have it read, he is bound by its terms, and the court can grant him no relief, if by such negligence he is defrauded.²

1093. If one signs a written contract without acquainting himself with its contents, he is estopped by his own negligence to ask relief from his obligations, if his signature be secured without fraud or artifice.³

1094. If no device is used to put a party off his guard, he having the capacity to read an instrument, and signs it without reading it, he places himself beyond legal relief. If the truth or falsehood of the representation might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglected to do so, and he is remediless.⁴

1095. Where an employee executing a release of claims for damages for personal injuries was, at the time of the execution of such contract, so much under the influence of

¹ Wallace v. C., St. P., M. & O. R. Iowa, 561; Bell v. Byerson, 11 Iowa, Co., 67 Iowa, 547.

² McKinney v. Herrick, 66 Iowa, 414. ⁴ Rogers v. Place, 29 Ind. 577; Nebeker v. Cutsinger, 48 Ind. 436.

³ McCormack v. Molburg, 43

drugs and opiates, taken to alleviate his pains and sufferings, as to be mentally incapacitated to contract, it was held that such a release was avoidable and not a defense to his cause of action.¹

1096. If a release is signed through the excusable mistake or negligence of the party he is not bound by it, and the burden of proof is on him to rebut the presumption of gross negligence. If grossly negligent, manifestly he would be bound by it, but the presumption is not a conclusive one. This is no doubt the true rule in the absence of proof to show that the party had been deceived, misled or overreached.²

1097. Where an employee testified that he did not know the contents of the instrument he signed, which was in effect a release of all claims for damages in consideration of the sum of \$32.50, and that he would not have signed it if he had known the nature of it, and that he supposed the money he received was to pay him for the time he was laid up with his wounds, and it appeared that the money was tendered to the defendant's attorneys after the answer was served, it was held that the evidence tended to prove that he signed the instrument without knowing its contents and without intending to sign such an instrument, and therefore was not bound by it.³

1098. It was held that a release executed to the defendant by the plaintiff in consideration of its caring for him at the hospital until he shall have sufficiently recovered to resume labor was not binding on him where it was shown that he could not read the instrument and that he did not read it when he signed it, but signed it at the request of his wife, who could not read, and, when it was read and explained to her by one of defendant's employees, understood that it was simply a receipt. The court say: "It is a general rule that

¹ Chicago, etc. R. Co. v. Doyle, Wis. 105, 58 N. W. 72; Sheanon v. 18 Kan. 58. Insurance Co., 83 Wis. 507.

² Albrecht v. M. & S. R. Co., 87 ³ Schultz v. C. & N. W. R. Co., 44 Wis. 638.

when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents; still, if the circumstances are such that he is not estopped from setting up his want of assent, he can be relieved if it can be made to appear that he did not in reality assent."¹

1099. A party is required to exercise reasonable care in acquainting himself with the contents of a paper, and will not be allowed, in an action by or against him on a contract, to show simply that he was ignorant of its contents when he signed it, and that it was different from what he supposed it was, and so avoid its effect. But this rule is subject to the condition that no fraud was practiced upon him for the purpose of procuring and which resulted in procuring his signature. It can hardly be said, as a matter of law, that a party is guilty of negligence who signs a paper relying upon the representations as to its contents and effect made by the party presenting it and without himself examining it.²

D. Release Obtained in Absence of Counsel.

1100. Where a release was obtained from a woman after she had commenced an action and employed counsel, and where she had no one to advise her except her daughter-in-law, and where it appeared that the execution of it was urged upon her by her attending physician, acting in behalf of the defendant, and where she desired a postponement until she could consult with her counsel in regard to the matter, it was said that these circumstances were of great weight. That no release, obtained after the action had been commenced and counsel employed, in the absence of such counsel, and without his consent or knowledge, should bind the party unless the utmost good faith is shown on the part

¹ *Smith v. Occidental & O. S. Co.*, 339; *Trambly v. Ricard*, 130 Mass. 99 Cal. 462. 259; *Jackson v. Olney*, 140 Mass.

² *Freedley v. French*, 154 Mass. 195.

of the defendant in obtaining the same. Where a party has employed an attorney to prosecute an action, such attorney ought to be consulted if a compromise of such action is sought, and ordinarily it would be an act of bad faith on the part of the client and the opposite party to compromise the action without the consent of or without consulting such attorney.¹

E. Insurance Contracts.

1101. A railroad company had connected with it a relief department composed of employees who contributed certain amounts from their wages towards an insurance fund for their relief when injured, and for relief of beneficiaries named in case of death. The railroad company collected the funds, furnished the necessary clerical force and guaranteed payment of loss. A member of this association agreed that, in consideration of the amounts paid by the company, the acceptance of benefits paid for injury or death should operate as a release of all claims for damages against the company arising from such injury or death which could be made by him or his legal representatives. He was killed in an accident upon the railroad. The beneficiary named was his widow, who accepted the benefits, and by an instrument in writing received it in full satisfaction and discharge of all claims or demands on account of or arising from the death of the deceased which she then had, or could thereafter have, against either the relief fund or the railroad company on behalf of herself and her children. It was held:

1. That the contract of the deceased did not waive a right of action by the administrator, chapter 21, Compiled Statutes (Lord Campbell's Act), providing that "whenever the death of a person shall be caused by wrongful act, negligence or default, and the act, negligence or default is such as would, if death had not ensued, have entitled the party

¹ *Bussian v. Milwaukee, Lake* 419. See, also, *Chicago, etc. R. Co. Shore & W. R. Co.*, 56 Wis. 325, cit- v. *Doyle*, 18 Kan. 58; *Eagle Packet ing Watkins et al. v. Brant*, 46 Wis. Co. v. *Defries*, 94 Ill. 598.

injured to maintain an action, then the person who would be so liable shall be liable notwithstanding the death." That this contract was not a compromise or a satisfaction.

2. That neither the contract nor the acceptance of the money, or release of liability by the widow, operated to bar a right of action by the administratrix on behalf of the children.

3. That her voluntary acceptance of the benefit and release of the company operated to bar any action for her own benefit.¹

1102. Where an employee of a railroad company becomes a member of a relief association, and as a condition of membership, and in consideration of the contributions of the railway company to said association, and of the company's guarantee of the payment of the benefits of the association in case of injury, signs a contract by which he releases the company from liability by reason of an accident that may happen to him while in the company's employ, an action will not lie against the company where both before and after bringing the action he received money from the association on account of the injury, and gave receipt releasing and discharging the company from all claims for damages.²

1103. A provision of the constitution of a railroad relief association "that before the association will pay the beneficiary of the member killed the amount of benefits due, the person legally entitled to damages for the death shall release the railroad company from all claims for damages," was held not to be so unreasonable as to be void.

Where the mother of the deceased member was designated as beneficiary, and upon his death his wife and minor child, who were the persons legally entitled to damages, did not release the company, but brought suit and recovered damages by a compromise, it was held that the mother had no right of action against the relief association for the benefits.

¹ C. B. & Q. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120.

² Martin v. Baltimore & O. R. Co., 41 Fed. 125.

The railroad company by the provisions of the constitution was not released, but if suit was brought against it, there could be no claim against the relief association for benefits.¹

1104. The membership of railroad servants in a relief fund association being voluntary, the stipulation in the application for membership, that acceptance of benefits for an injury shall release all claims for damages against the railroad company, is not invalid as an attempt on the part of the railroad company to contract against its liabilities for negligence, nor because it may enable the railroad company to settle some claims for less than it otherwise could. There is no rule of public policy which condemns such an arrangement. Such an agreement is not bad for want of mutuality, where the railroad company is a member of the association and a party to the contract by which the employee becomes a member, and where such company is in charge of the association, guarantees the obligations, pays the expenses, makes up deficiencies, if any, and supplies medical and surgical attendance for the members.²

1104a. Where railroad companies had charge of a relief association, of which such companies and their employees were members, such companies guaranteeing the obligations, supplying the facilities for doing the business and making up the deficits, if any, in the funds, it was held that an employee who voluntarily, in his application, signed an agreement that an acceptance of benefits from the association for an injury should release the company from any claim for damages therefor, could not be heard to claim that such release was invalid as against public policy. Such an agreement contains no stipulation that the plaintiff shall not be at liberty to bring an action for damages. This right remains as before. By the contract he was given his election either to receive the benefits or to waive them and pursue his rem-

¹ Fuller v. Baltimore & Ohio Employees' Relief Ass'n, 67 Md. 433, 10 Atl. 237; Graft v. Baltimore & Ohio R. Co. (Pa. St.), 8 Atl. 206.

² Lease v. Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423.

edy at law. Having accepted the benefits, he was precluded from maintaining an action against the company.¹

1104b. Nor can such an employee avoid the effect of his agreement on the ground that he signed the agreement without reading it or understanding its purport, and that he was at a disadvantage in dealing with the company. The fact that at the time of receiving benefits from the association he was not advised of the strength of his case, nor of certain important facts and the witnesses to prove them, will not avoid the effect of his election.²

1105. Where a member of a railroad benefit association, who had received its benefits when injured and executed a release of claim against the company, and thereafter in a suit brought by him alleged by a replication that the railroad company had not complied with all the provisions which were the inducement of membership, it was held that his pleading was demurrable; that it did not seek to avoid the release on the ground of fraud; that he had received the stipulated benefits the same as though the inducements had existed.³

1105a. That contracts which include a release of the railroad companies from all claims for damages are not against public policy, but are valid, was held in cases cited in note.⁴

F. *Return of Money Paid.*

1106. One who seeks to rescind a compromise of a disputed claim on the ground of fraud must promptly, on the discovery of fraud, return or offer to restore to the other party whatever he has received by virtue of it, if of any value. The tender must be without qualifications or conditions. He must rescind before the commencement of the

¹ *Otis v. Pennsylvania Co.*, 71 Fed. St. 127; *Donald v. Railroad Co.* (Iowa), 61 N. W. 971; *Fuller v. Association*, 67 Md. 433, 10 Atl. 237;

² *Vickers v. C., B. & Q. R. Co.*, 71 Fed. 139. *Owens v. Railway Co.*, 35 Fed. 715;

³ *Spitze v. Balt. & Ohio R. Co.*, 75 Md. 162, 23 Atl. 307. *Martin v. Railroad Co.*, 41 Fed. 125; *Shaver v. Pennsylvania Co.*, 71 Fed.

⁴ *Johnson v. Railroad Co.*, 163 Pa. 931.

action. If no rescission is shown, a final determination by the court that plaintiff was entitled to more than the sum paid is no answer to the objection.¹

1107. A suit to rescind a release of a claim for personal injuries cannot be maintained without tendering back the money paid as a consideration therefor, and keeping the tender good. The reasoning of the court is that the money is paid in part to save the costs and expenses of litigation even if the result should be favorable. If the plaintiff should prosecute the action, and the judgment should be adverse to him, he would still have in his possession the money paid him to procure a settlement, and thus, in effect, the defendant would be deprived of all benefits of the settlement, without having secured to it the return of the money which it paid to secure a settlement.²

1108. One may sue for personal injuries without tendering a return of the money received for a release of his claim, which he contends was obtained by fraud and while he was mentally incapable, it being sufficient that the court instructs that if the jury find for the plaintiff they shall deduct from the amount awarded the sum already received.³

1109. If a release of a cause of action is obtained from a person by fraud and circumvention, at a time when he is incapable of making a contract rationally, and money is paid him at the time of its execution, he may repudiate the release and bring his action without first paying or tendering back the money received by him.⁴

1110. Where a release and settlement of a claim against an insurance company was insisted upon as a bar to an action upon the policy, and the money paid had not been returned or tendered, and the court allowed the sum so paid

¹ Gould v. Cayuga County Nat. Bank, 86 N. Y. 75; Pangborne v. drickson v. Hendrickson, 51 Iowa, 68.

Continental Ins. Co., 67 Mich. 683.

² Vandervelden v. C. & N. W. R. Co., 61 Fed. 54.

³ O'Brien v. C., M. & St. P. R. Co., 9 Iowa, 644, 57 N. W. 425; Hen-

⁴ Railway Co. v. Lewis, 109 Ill.

120. See, also, Allerton v. Allerton, 50 N. Y. 670; Mullen v. Railroad

Co., 127 Mass. 86.

to be credited as so much paid on account of the injury, it was said: The defendant had no right to complain that this sum was not tendered or paid back before the action was commenced, and as a condition of recovery. If the action could not be maintained, clearly the plaintiff was entitled to retain the money. If it could be maintained, and there was no cause of action for weekly indemnity, but was for loss of feet, the most the company has a right to claim is that the payment be used as a set-off to the plaintiff's claim.¹

¹Sheanon v. Pacific Mutual Ins. Co., 83 Wis. 507-527.

CHAPTER VII.

CONTRIBUTORY NEGLIGENCE.

- A. *Rule*, 1111 et seq.
- B. *Choice of Methods or Position — Voluntary Acts*, 1121 et seq.
- C. *Choice of Methods of Escape*, 1151 et seq.
- D. *Customary Methods*, 1159 et seq.
- E. *Discovery of Servant's Peril — Precautions After*, 1177 et seq.
- F. *Haste and Diverted Attention — Effect of*, 1190 et seq.
- G. *Railroads — Operation of*, 1199 et seq.
 - 1. Coupling Cars, 1199 et seq.
 - 2. Moving Cars — Mounting and Alighting from, 1121, 1152, 1218 et seq.
 - 3. Place of Duty — Absence from, 1235 et seq.
 - 4. Precautions — Failure to Take, 1252 et seq.
 - 5. Tracks — Crossing; Working and Walking on, 1270 et seq.
- H. *Statute Enactments — Effect on Contributory Negligence*, 1290 et seq.
 - 1. Blocking Frogs, 1291 et seq.
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 - 3. Cattle-guards and Crossings, 1297.
 - 4. Elevator Holes, Guarding, 1298.
 - 5. Shafts in Mines, Fencing, 1299 et seq.
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 - 7. Fires — Prescribing Liability for, 1303.
 - 8. Sign-boards, Erection of, 1309.
 - 9. Sounding of Whistle and Ringing of Bell, 1310.
 - 10. Speed of Trains, 1311.
 - 11. Sunday, Labor on, 1312.
- I. *Alabama Rule*, 1313 et seq.
- J. *Florida Rule*, 1319.
- K. *Georgia Rule*, 1320 et seq.
- L. *Kentucky Rule*, 1322 et seq.
- M. *Tennessee Rule*, 1336.
- N. *Illinois Rule*, 1337 et seq.
- O. *North Carolina Rule*, 1345.
- P. *Burden of Proof in the Several States*, 1346 et seq.

A. *Rule.*

1111. Where there has been negligence on the part of the plaintiff as well as the defendant in the same connection,

the result depends upon the facts. The question in such cases is:

1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or

2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened.

In the former case the plaintiff is entitled to recover; in the latter he is not.¹

1112. A charge that "contributory negligence by the act of negligence on the part of an employee is such an act of negligence as that the injury would not have occurred if the employee had not been guilty of such act of negligence, correctly states the rule."²

1113. In an action by an employee of a railroad company against the company to recover damages for personal injuries, in order to determine whether the employee by recklessly exposing himself to peril has failed to exercise the care for his personal safety that might reasonably be expected, and has thus by his own negligence contributed to causing the accident, regard must be had to the circumstances of the case and the exigencies of his position, and the decision of the question ought not to be withheld from the jury, unless the evidence, after giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively establishes contributory negligence that the court would be compelled, in the exercise of a sound judicial discretion, to set aside any verdict rendered in his favor.

This was said where on the trip it was discovered a step on a car of a freight train was missing, which the employee knew, and he, while in the performance of his duties, when the weather was severe and cold, forgot that the particular car was thus defective, and in descending from it was by

¹ Railroad Co. v. Jones, 95 U. S. 439.

² Murray v. Gulf, C. & S. F. R. Co., 73 Tex. 2, 11 S. W. 125.

reason thereof injured. His negligence was held to be a question for the jury.¹

1114. An instruction that "if the plaintiff himself was guilty of any negligence which materially contributed to the happening of the injury he could not recover" was held to be error. It was said that the rule cannot thus be qualified. The true rule is that a plaintiff cannot recover who has contributed in any degree to his injury.²

1115. The bare fact that a position to which an employee is ordered is dangerous will not justify his disobedience, since he was employed for that duty, and its discharge may be necessary to save the lives of others, and a failure to do this duty might be negligence on his part. To assume a position of danger is not negligence, but often a clear duty, and an employee if injured would have no right of action, since he was employed for such position of danger and paid for assuming it. If, however, the prior negligence of others unnecessarily created the danger, or by reason of the negligence of others the injury was caused to him, then he may have his action.³

1116. The mere fact that an employee knew that the work was manifestly dangerous does not constitute contributory negligence. If it is shown that he used that which was dangerous in a negligent manner, this would be contributory negligence.⁴

1117. A person seeking to recover for an injury sustained through the alleged negligence of another will not be excused for his own negligent act, contributing thereto, although he had good ground for believing as a reasonably prudent man, and did believe, such act was not imprudent.⁵

¹ Kane v. Northern Central R. Co., 128 U. S. 91.

² Mattimore v. City of Erie, 144 Pa. St. 14; Monongahela City v. Fischer, 111 Pa. St. 9; Oil City Fuel Supply Co. v. Boundy, 122 Pa. St. 449.

³ Frandsen v. C., R. I. & P. R. Co., 36 Iowa, 372.

⁴ Mobile & B. R. Co. v. Holborn, 84 Ala. 133, 4 So. 146.

⁵ Pieart v. C., R. I. & P. R. Co., 82 Iowa, 148; Muldowney, Adm'r, v. Railway Co., 36 Iowa, 462.

1118. Where an employee was instructed by his superior to get off a train at a certain point if it was going slow, otherwise to go on to the next station, and deceased jumped off and was killed, and the defendant requested that the court charge, if under these facts a discretion was left to the employee whether he would jump off or not, then the plaintiff could not recover on account of the direction given by such superior, which the court refused, but the court did charge that if he negligently exercised such discretion he could not recover, it was held that the instruction asked should have been given.¹

1119. An employee was put at work on a platform on defendant's ice-house and warned not to go on a certain part, which was not railed, because of the danger of slipping on the ice and falling off. He disregarded the warning and was knocked to the ground and injured by bricks falling from the building above him through defendant's negligence. He had no knowledge of the defects in the building.

It was held that his negligence was not the proximate cause of his injury and did not defeat his recovery. It was said: The act or omission of a party injured which amounts to contributory negligence must be a negligent act or omission, and in the production of injury it must operate as a proximate cause or one of the proximate causes, and not merely as a condition. The plaintiff's conduct, legally considered, was not a cause of the injury. It was a condition, rather. If he had not changed his position he might not have been hurt, and so, too, if he had never been born, or had remained home on the day of the injury, it would not have happened, yet no one would claim his birth or his not remaining at home on that day can in any legal sense be deemed a cause of the injury.

If the plaintiff's injuries had resulted from any of the perils and dangers attendant upon the mere fact of his standing and working on the east end of the platform, which

¹ Louisville & N. R. Co. v. Pitt, 91 Tenn. 36, 18 S. W. 118.

were obvious and manifest to any one in his place, which were in the mind of the foreman when he told the plaintiff not to go there, and in view of which his fellow-workmen warned him, then the claim of the defendant would be a valid one. The injury to the plaintiff was not the result of any such dangers, but was caused through the negligence of the defendant by the falling walls. This was a source of danger of which he had no knowledge.¹

1120. An act or omission that merely increases or adds to the extent of the loss or injury will not have the effect of establishing such contributory negligence as will defeat a recovery, though it may affect the amount of damages in a given case. To have that effect, it must be an act or omission which contributes to the happening of the act or event which caused the injury.²

B. Choice of Methods or Position — Voluntary Acts.

1121. It is a familiar principle, which common sense as well as the rules of law ought to teach any one, that where an employee of a railroad knowingly selects a dangerous way when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence.

This rule was stated and applied where a brakeman was injured by his clothes catching in a switch as he was boarding a caboose while the train was moving.³

1122. The mere fact that an employee is injured because of the way of performing a duty which he selected, when, if he had selected the other way, injury would have been avoided, does not conclusively show contributory negligence.

¹Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 Atl. 924. See, also, Gray v. Scott, 66 Pa. St. 345.

²Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 Atl. 924, citing Gould v. McKenna, 86 Pa. St. 297; Stebbins v. Railroad Co., 54 Vt. 464.

³Richmond & D. R. Co. v. Bivins, 103 Ala. 142, 15 So. 515. See, also, Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 So. 360; Mobile & B. R. Co. v. Holborn, 84 Ala. 133, 4 So. 146.

The result is not the true test. The law is correctly stated in *Richmond & D. R. Co. v. Bivins*, 103 Ala. 142, 15 So. 515.¹

1123. Where a person having a choice of two ways, one of which is perfectly safe and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover.²

1124. An employee must take care of himself as well as the master must take care of his duties and his employees. These obligations are mutual, and it is the law that if a man voluntarily puts himself in a dangerous position, does so unnecessarily when there are positions in connection with the discharge of his duties which are safe which he can be placed in, he cannot recover damages for the injury to which he has contributed by his own negligence.

This was said where a section-man released his hold upon a hand-car, descended therefrom, stood upon the track on a down grade in front of a dump-car which had by chance become detached from the hand-car, and, closely following it, ran over him causing his death.³

1124a. The fact that an employee upon a construction train ran from the front of the train upon a request from the conductor to go to the rear in order to drop off as the train slowed up, at a time when the train was going some eighteen or twenty miles an hour, and he had been cautioned by his foreman against running on the cars when in motion, was held to be such contributory negligence as would prevent a recovery where injured.⁴

1124b. It was held to be contributory negligence on the part of the conductor of a construction train to mount to the top of the shanty car to give signals, where the act was

¹ *Tennessee Coal, Iron & R. Co. v. Herndon*, 100 Ala. 451, 14 So. 287. See, also, *Cunningham v. Railway Co.*, 17 Fed.

² *Haven v. Bridge Co.*, 151 Pa. St. 882.
620.

⁴ *Saner v. Lake Shore & M. S. R. Co.* (Mich.), 65 N. W. 624.

³ *C. & N. W. R. Co. v. Davis*, 53 Co. (Mich.), 65 N. W. 624.

unnecessary and not customary, and where he was injured by the car being derailed.¹

1125. Where a brakeman was ordered to go to a switch, and two ways were open to him, one entirely safe and the other very perilous, and he left the safe way after having gone upon it (a path by the side of the track), and took the track in front of the moving engine, knowing the danger to which he exposed himself and using no precaution to avert it, and was run over by such engine, it was held he was guilty of contributory negligence and could not recover. It was said: It is incumbent upon an employee, whether acting under orders or not, engaged in the line of his duty, to exercise ordinary care. Where he has been long in the service and has become familiar with the manner of making up trains, he is bound to act upon the knowledge thus acquired.²

1126. Where a fireman was walking through the switching yard to the round-house to take out his engine, and was struck by cars which had been kicked by a switch-engine upon the track on which he was walking, and it appeared he was familiar with the yard and knew that switching was in progress, and the fact was that there were spaces between the tracks where he could have walked with safety, and, although his ears were covered by his cap, he walked on the main track for about one hundred and eighty feet without looking around, it was held that he was guilty of contributory negligence.³

1127. It was held that a brakeman who, by the exercise of ordinary care, had the power to regulate the speed of approaching cars, could not recover for an accident of which his failure to check the speed was wholly or in part the proximate cause.⁴

1127a. Where an employee, engaged in operating a jointer for trimming sash, brought his hand in contact with the

¹ Georgia C. & N. R. Co. v. Hallman (Ga.), 23 S. E. 73.

² Pennsylvania Co. v. O'Shaughnessy, 122 Ind. 588.

³ Wilber v. Wis. Central R. Co., 86 Wis. 535.

⁴ Muldowney v. Ill. Central R. Co., 39 Iowa, 615.

knives in attempting to force down by hand a sash which had raised up, and it appeared he could have stopped the machine and readjusted the sash, it was held he was guilty of contributory negligence in not doing so.¹

1127b. A switchman was injured in the attempt to uncouple a car in front of an ordinary road-engine while in motion. It appeared that the act was dangerous, that the engineer was subject to his orders, and that he could have had the engine stopped while performing the act. It was held that he was guilty of contributory negligence. If he acted under the direction of his superior, that would not excuse him.²

1128. Where an employee of a railroad company needlessly places himself in a dangerous position on one of the company's moving cars when in the performance of his duties, and injury follows in consequence, he cannot recover.³

1129. It was said that if a man voluntarily and unnecessarily puts himself in a dangerous position when there are other positions that he may take in connection with the discharge of his duties that are safe, he cannot recover damages for that injury.

This was said where a yardman attempted to board a switch-engine upon which he was working, by standing in the middle of the track and stepping on the rear foot-board of the tender.⁴

1129a. Where it appeared that it was customary for brakemen to mount a switch-engine, having a foot-board, from the front, while the engine was moving toward them, it was held not contributory negligence for a brakeman thus to attempt to mount the engine.⁵

1130. It was held that an engineer who, to make necessary repairs, went out on the running-board of his locomotive,

¹ *Moody v. Smith* (Minn.), 67 N. W. 633.

² *George v. Mobile & O. R. Co.* (Ala.), 19 So. 784.

³ *Mortensen v. C., R. I. & P. R. Co.*, 60 Iowa, 705.

⁴ *Cunningham v. C., M. & St. P. R. Co.*, 17 Fed. 882.

⁵ *Prosser v. Montana Cent. R. Co.*, 17 Mont. 372, 43 Pac. 81.

tive while it was running seventeen or eighteen miles an hour, when it was unusually dangerous because of a defect in the engine, when the engine and train could have been stopped or speed slackened in a short distance, was guilty of contributory negligence which precluded a recovery for injuries caused by being thrown from the engine.¹

1131. Section-men connected with work-trains having habitually ridden on the caboose or on the flat-cars as they pleased, and the company having so carried them without objection, it was held not error to refuse an instruction that riding on a flat-car is contributory negligence if it is more dangerous than riding in a caboose.²

1132. Where an employee was thrown out of an opening in the sides of a box-car in which he was riding by a sudden lurch of the train, owing to the rough condition of the track and the speed of the train, and he might have passed along the opposite side of the car, it was held that he was guilty of contributory negligence; and the fact that he left a safe position in the rear of the car for fear of an accident, and to be near the opening so that in case of an emergency he could jump, does not relieve him from the charge of negligence.³

1133. It was said that a brakeman was not guilty of contributory negligence merely because he selected the more dangerous way of descending a car, where the injury was caused, not by the way selected, but from a defect in the car. He was killed by the giving way of the hand-hold.⁴

1134. If in the discharge of a dangerous duty an employee of a railroad company voluntarily places himself in a dangerous position unnecessarily, when there is another place that is safer that he could have chosen, and he has time to exercise his judgment, and injury occurs to him by his choice, he cannot recover for such injury. There is a want of or-

¹*Southern Pac. R. Co. v. Johnson*, 64 Fed. 951 (C. C. A.).

²*Taylor, B. & H. R. Co. v. Taylor*, 79 Tex. 104, 14 S. W. 918.

³*Taylor v. Richmond & D. R. Co.*, 109 N. C. 233, 13 S. E. 736.

⁴*Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176.

ordinary care in the voluntary attempt of an employee of a railroad company, discharging the duties of a helper to a hostler, to get upon a switch-engine when in motion by the step at the rear right-hand side of the cab of the engine, when he had no duty to perform in the cab of the engine, and when a safer place for him to get upon the engine would be the rear foot-board that was used for that purpose by that class to which he belonged, and when the danger of the attempt to get upon the side is increased by the step being obscured to some extent by the escaping of steam from the cylinder cocks of the engine and the dust blown up thereby. That the engine step was defective will not relieve him from the charge of negligence.¹

1134a. It was held contributory negligence on the part of an employee engaged in cleaning windows to suspend himself by rope and tackle from the outside of the building, when the work could have been more safely done from the inside, though his injuries were caused by a defect in the rope.²

1134b. Where an employee was injured by reason of a defect in a machine, while he was using it temporarily in the absence of the operator, where he claimed he had directions from the foreman to operate the machine in the temporary absence of the one employed for that purpose, which was denied by other testimony, it was said: If the plaintiff went to work upon the machine of his own accord without directions from the defendants or their foreman, knowing it to be out of order and dangerous, without first ascertaining whether it had been repaired, he himself would be guilty of negligence.³

1135. It was said that an employee in an oil mill who is directed by a superior to go to a distant point with no direction as to the route to take, if he is ignorant of the route

¹ *Union Pacific R. Co. v. Estes*,
37 Kan. 229, 16 Pac. 131.

³ *Schulz v. Rohe et al.*, 149 N. Y.
132.

² *Erskine v. Chino Val. Beet
Sugar Co.*, 71 Fed. 270.

should inquire; and if, failing to inquire and without the direction or knowledge of the superior, he selects an improper or dangerous route, through and among machinery and passing over and under running wheels and belts, he is at fault and assumes the risk of resulting injury.¹

1135a. Where an experienced employee in a saw-mill voluntarily put his hand into a hole in the boxing around a trimmer, and attempted to pick up the end of a broken chain which was lying within two or three inches of a revolving saw, his hand coming in contact therewith, it was held that he was guilty of contributory negligence as matter of law. It was said: The mere fact that the plaintiff had, the spring before, remonstrated against the saws being boxed, and had been assured the work would be all right, did not excuse the plaintiff from exercising ordinary care to avoid the danger.²

1136. Where a flagman upon a yard locomotive was killed by jumping from the foot-board on the front of the engine to the ground directly in front and between the tracks, the engine overtaking and running him down, it was held that his representatives could not recover, on the ground that the act was unnecessarily dangerous and was negligence. That there was but one way to perform his duty with safety to himself. He selected another and more dangerous one by getting down in front of the engine between the rails.

The rule applied was thus stated: "The servant cannot recover where his own want of care has contributed to the injury. If among the different modes of performing a duty he selects the most dangerous, which unnecessarily exposes him to danger, he is responsible for the selection."³

1137. That as between two apparently safe positions an employee failed to choose the one which proved to be safe in fact cannot be ascribed to him as negligence.

¹ *Sauer v. Union Oil Co.*, 43 La. 699, 9 So. 566.

³ *Dandie v. Southern Pac. R. Co.*, 42 La. Ann. 686, 7 So. 792.

² *Schultz v. C. C. Thompson Lumber Co.*, 91 Wis. 626.

This was said where an employee was killed while assisting in removing sections of a heavy wheel, which fell by reason of the inadequacy of the rope and supports used, and at the time of injury he was sitting on the hub of the wheel, and it was urged that he could have stood upon a platform there, and if he had he would have escaped injury.¹

1138. Where a section-man of a street-car company whose trains were moved by a steam-moter was directed by his foreman to take passage in one of its trains, and not to get on so as to bother the passengers, and he took his seat on the front platform, with his foot resting on the step, and he was injured by his foot coming in contact with an embankment left near the track, it was held that the question of his contributory negligence was for the jury.²

1138a. It was held not contributory negligence for a line-man in cutting a guy-wire, attached to a pole, under directions, in failing to cut the wire at the end which was attached to a tree, where he was injured by the pole falling with him.³

1139. An employee in a flouring mill was injured by his hand getting caught by projecting keys which adjusted and held in place wheels revolving upon shafts. There was evidence tending to show that he was familiar with the construction of the appliances, and that he could reasonably have avoided danger by approaching them from the outward revolutions of the gear, and that he did not do so because he did not think or look.

It was held that an instruction to the effect that if he knew the position, condition and character of the machinery by which he was injured, and could reasonably have avoided danger by approaching the same from the outward revolutions of the gear, and did not do so because he did not think or look, he was guilty of such a degree of negligence as to preclude a recovery, stated the law correctly.

¹ *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094.

³ *Bland v. Shreveport Belt R. Co.*, 48 La. Ann. 1057, 20 So. 284.

² *Denver & B. P. R. T. Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106.

It was held further that an instruction which stated that it was the duty of such employee, when approaching machinery about which he was employed, both to think and look in order to avoid injury from such machinery, and if he received injury by reason of his failure to think and look as to what he was doing he was guilty of such negligence as would preclude a recovery, was a correct statement of the law.¹

1140. Where an employee of an electric light company was killed by a current of electricity passing through him, caused by his grasping wires where exposed, and it appeared he had selected the shunt wire himself, the defects of which were visible, it was held there was no proof of neglect on the part of the defendant, and negligence appeared on the part of the plaintiff.²

1141. An employee of a railway company who was familiar with the premises, and who, in going from the freight-house to a pier, used a narrow passage between the track and the platform when there was a safer though longer way, and the narrow passage, though sometimes used, was not designed to be used for the purposes of travel, and he was injured by being pressed between a locomotive and the platform, it was held that he was guilty of negligence.³

1142. Where a section-man engaged in repairing a track mounted a car loaded with ties in a train having a caboose attached, which ties were to be distributed along the track, and it appeared that it was the custom for such employees to ride on cars loaded with ties; that his foreman saw him in such position before he directed the conductor to start the train, and the conductor also saw him before ordering the engineer to start, and such employee was thrown from the car and killed by the sudden starting of the train, the usual signal not being given, it was held that it was a ques-

¹ *Hurst v. Burnside*, 12 Oreg. 520, 8 Pac. 888.

³ *Galvin v. Old Colony R. Co.*, 162 Mass. 533, 39 N. E. 186.

² *Piedmont Electric L. Co. v. Patterson*, 84 Va. 747.

tion for the jury whether he was guilty of such negligence as would prevent a recovery under section 422 of the Civil Code. It was said: We cannot say as matter of law as in the *Estes Case* (*Railway Co. v. Estes*, 37 Kan. 715, 16 Pac. 131), that the deceased voluntarily placed himself in a dangerous position unnecessarily when there was another place that was safer that he could have chosen, and that he had time to exercise his judgment therein.¹

1143. Where a man voluntarily and without necessity went from one place of work into another part of the mine where it was dangerous, and was there injured by a falling rock, it was held that this was such contributory negligence as would bar a recovery. If the master was negligent, and if the employee took the course to reach the surface, having knowledge of danger there, when there was a safer course known to him, he was equally guilty of negligence.²

1144. Where it appears that an employee, acting in the capacity of conductor and engineer of a construction train, was killed while crossing a trestle by its giving way under the weight of a train, in consequence of the foundations having been washed out by an unusual flood, and he had examined the trestle on the day of the accident and knew that the water was rapidly rising and the imminent danger to the trestle therefrom, it was held that in attempting to cross with his train without orders to that effect or immediate necessity therefor, he was guilty of such negligence as would prevent a recovery, even though the watchman gave the safety signal.³

1145. It was held that an engineer who voluntarily assumed continual service, and, becoming exhausted from his long-continued service without sleep or rest, fell asleep at his work, and was injured while in such condition, could not recover from the company.⁴

¹ *Union Pacific R. Co. v. Geary*, 52 Kan. 308, 34 Pac. 887.

² *Colorado Coal & Iron Co. v. Carpita* (Colo.), 40 Pac. 248.

³ *Columbus & W. R. Co. v. Bridges*, 86 Ala. 448, 5 So. 864.

⁴ *Nattress v. Phil. & Read. R. Co.*, 150 Pa. St. 527.

1146. It was said that an employee of a railroad company is at fault where he knowingly exposes himself to extraordinary danger at night by assisting to carry a train over the unsafe track of another railroad. The corporation does not insure his safety against reckless locomotion which he assists to conduct, with knowledge that it lies outside of his regular employment, and that it is extra hazardous. He cannot rightfully presume that the corporation has authorized or will sanction the order of any officer or agent who directs business, to proceed under circumstances which place both life and property in obvious and imminent peril.¹

1147. An employee who with knowledge of the fractious disposition of a horse drives him within five feet of a moving locomotive from which steam is escaping is guilty of such contributory negligence as will defeat a recovery for injuries received by reason of the consequent frightening of the horse.²

1148. Where it appeared that an employee upon a carriage in a saw-mill had knowledge that a log which was being sawed was very crooked, which made it his duty to run the carriage slowly, but he in fact ran it at an unsafe rate of speed, which contributed to the injury which he received, it was held that he was guilty of contributory negligence preventing a recovery, notwithstanding a special finding by the jury to the contrary.³

1149. Although it is gross negligence for a railroad company to run its trains in the dark without a head-light, yet one who, knowing the time for a train to pass over the road, attempts to pass over the road in a hand-car at the time a train, if on time, will meet and collide with him, is guilty of such negligence as will prevent a recovery by him.⁴

1150. Where, in order to adjust a belt upon a shaft which operated an elevator, it became necessary for an employee to go upon the other side of the shaft and then return and

¹Galloway v. Western & A. R. Co., 57 Ga. 512.

²Mahan v. Cleve, 87 Mich. 161.

³Bibby v. Wausau Lbr. Co., 80 Wis. 367.

⁴Burling, Adm'r, v. Illinois Cent. R. Co., 85 Ill. 18.

adjust a belt on the opposite side, and usually he crawled under the shaft in returning, but upon the occasion in question he stepped over the shaft, which was quite high from the floor, and in so doing was caught by a set-screw upon the shaft and injured, it was held that he assumed the risk of the danger from the election of the more dangerous way and could not recover.¹

C. *Choice of Methods of Escape.*

1151. The rule was stated that where an employee is suddenly and unexpectedly placed in a position of imminent danger, caused by the failure of duty on the part of others, he will not be held guilty of contributory negligence because he did not adopt the best means of escape, or made an error in judgment as to the best course to pursue.²

1152. It is negligence *per se* for a brakeman to jump from the pilot of a moving engine onto the track in front to attend to a switch, and evidence that it was the custom on defendant's road and other well-regulated roads for brakemen, when doing switch work, to ride on the pilot and leave it in order to do the switching before the engine came to a full stop, is properly excluded.³

1153. The rule that where a plaintiff is compelled to act at once in the presence of imminent danger he is not to be held guilty of contributory negligence as a matter of law, merely because he did not choose the best means of escape from the danger, only applies where the plaintiff is brought in the presence of danger by and through the negligence and want of care of the defendant or others, not where he is brought into such position by his contributory negligence.⁴

1154. A man under excitement or peril is only required to exercise such care for his safety as an ordinarily prudent man would have exercised under like circumstances, and if

¹ *Lewis v. Simpson*, 3 Wash. 641, 29 Pac. 207.

² *Schall v. Cole*, 107 Pa. St. 1.

³ *Andrews v. Birmingham Mineral Co.*, 99 Ala. 438, 12 So. 432.

⁴ *Baltzer v. Chicago, Madison & N. R. Co.*, 83 Wis. 459.

he exercise such degree of care, then he is not guilty of contributory negligence.¹

1155. The rule was applied in a case where the governor-belt run off a machine while being operated by an employee, whereby injury was threatened to the machine. Instead of abandoning his machine, and seeking a place of safety, he went under the machine to loosen the belt and was injured by the bursting of an iron pulley.²

1156. In an action by an engineer for injuries received in jumping from a train to avoid running into a wreck, it was held that the plaintiff could recover if, by reason of the actions of those in charge of the wreck, plaintiff was placed in a position which seemed to him one of unavoidable danger, and he jumped to avoid such danger.³

1157. Where a servant is in a dangerous position through the negligence of another, he must exercise care in selecting the means of escape that appear to be the least dangerous. This rule does not apply where such a state of terror and fright is produced as to render the mind incapable of selecting or determining the question. But if, as a fact, the mind is capable of determining which of the means of escape is the less dangerous, and these means are open to observation, the rule first stated may be applicable.⁴

1158. Where a workman placed in peril from the liability of a bridge, and a mass of drift-wood lodged against it, giving way, and the bridge and part of the drift did give way, and the workmen, including the deceased, escaped to a portion of the drift that remained, and the deceased, fearing that such remaining portion would give way also, jumped into the river and swam towards the shore and was drowned, and the others were saved, it was held that he was not guilty of such contributory negligence as would prevent a recovery.⁵

¹ *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86.

² *Schall v. Cole*, 107 Pa. St. 1.

³ *Louisville & N. R. Co. v. Rains* (Ky.), 23 S. W. 505

⁴ *Austin & N. W. R. Co. v. Beatty*, 6 Tex. App. 650, 24 S. W. 934.

⁵ *Louisville & N. R. Co. v. Shively's Adm'r* (Ky.), 18 S. W. 944.

D. Customary Methods.

1159. Where it is within the duty or the scope of the employment of a servant to perform a particular service which is attended with some danger, and where it becomes incumbent upon him to show that on the particular occasion he was in the exercise of due care, evidence is competent in his behalf to show that he conducted himself in the usual and ordinary way in which similar acts were done by persons engaged in like employment.¹

1160. It was held competent for a plaintiff, in order to show that he was not guilty of contributory negligence, to prove that in performing the duty in which he was engaged when he received the injury he adopted the course usually pursued under the same circumstances by men of that calling, though in the employment of other companies.²

1160a. It was held that it could not be said as matter of law that a brakeman was guilty of contributory negligence in making a flying switch when such was the custom at the particular track.³

1161. Where a brakeman, as one of a shifting crew, was ordered to take some cars loaded with lumber and pushed by an engine to a track some three hundred yards distant, and he rode on the side of the cars with one foot in the stirrup, and while in that position the car became derailed by reason of a defect in the track, it was held that whether he was guilty of contributory negligence in assuming that position, it appearing that such was the customary method, was a question for the jury.⁴

1162. It was held a question for the jury whether it was negligence for a switchman to ride from one part of a railroad yard to another standing on the step of a car while switching, in a case where he was injured by being brushed

¹ Daley v. American Printing Co., 150 Mass. 77.

² St. Louis & S. F. R. Co. v. French, 56 Kan. 584, 44 Pac. 12.

³ Whitsett v. C., R. I. & P. R. Co., 67 Iowa, 150; Jeffrey v. Keokuk & D. M. R. Co., 56 Iowa, 546.

⁴ Pennsylvania Co. v. Zink, 126 Pa. St. 288.

from the car, while occupying such position, by a switch-target located close to the track.¹

1163. It is not negligence for a switchman to stand on the ladders of cars while going from one place in the yard to another in the performance of his duties; and where one such is injured by contact with a car negligently left on another track dangerously close to the track upon which the car is moving, whereby he is brushed from his position and injured, he will not be held guilty of contributory negligence. It was said: The most cautious and prudent employees use those ladders and steps for such purposes. This is what they are for, as well as ascending and descending over the sides of the cars.²

1164. It was said in reference to evidence tending to show that it was the usual custom of brakemen in the yards upon the particular road to ride on the pilot of freight engines that were engaged in switching, that it would naturally, from such proof, be inferred that the jury would conclude that the (injured employee) had assumed the usual position that custom in that yard had sanctioned, when he placed himself on the beam of the engine, and that this custom was known to the company. That it was a necessity arising from the structure of the engines used in switching, and that they had suffered and allowed it to be done; that the deceased had only done what his observation and experience had shown to have been done by other employees engaged in the same kind of duty.

No question seems to have been raised as to the competency of such evidence.³

1165. Evidence of the general custom of brakemen to pass up and down the sides of cars while in motion, and jumping off to open and close switches, is admissible upon

¹ Johnston v. Oregon S. L. & U. Adm'x, 94 Ky. 368, 22 S. W. 607. N. R. Co., 23 Oreg. 94, 31 Pac. 283. See Kansas City & M. B. R. Co. v.

² Martin v. Louisville & N. R. Co. Burton, 97 Ala. 240, 12 So. 88. et al., 95 Ky. 612, 26 S. W. 801; ³ Missouri Pacific R. Co. v. Mc-
Louisville & N. R. Co. v. Earl's Cally, 41 Kan. 639, 21 Pac. 574.

the question of the employee's negligence, where he is injured while thus engaged by contact with a section-house or structure located close to the track. Not that a negligent act will be excused by the fact that it is customary, but proof of custom is evidence, although not conclusive, as to whether the act is negligent.¹

1165a. A conductor on a street railway was injured while engaged in switching his car from the main to a side-track. He occupied the usual place, standing in the V-shaped space between the two tracks. Another car had stopped just behind him on the main track. At this moment the motorman upon his car moved the car forward, and the conductor was wedged between the two cars. It was held he was not guilty of contributory negligence.²

1166. Where a yard-master was injured while in the act of jumping from a moving engine in the night-time, and the trial court, against objection, permitted it to be shown what the practice was in that yard for such employees in getting off from moving engines, this was held error. It was said: This was entirely a collateral matter. The necessary effect of such testimony would be to cause the jury to believe that, if others jumped from engines, it was not negligence for plaintiff to do so. There is no such rule. *Lewis v. Smith*, 107 Mass. 334, was cited as sustaining the position of the appellate court. It however has no bearing upon the question.³

1167. The fact that one is doing an obviously dangerous thing does not make his act any the less a dangerous one. The fact that many or all of a limited class of persons customarily ride upon the pilot of an engine does not alter the characteristic of obvious peril which the law imputes to that position. It is negligence *per se* for persons to walk upon the track of railroads. Doubtless many persons are

¹ *Flanders v. C., St. P., M. & O. R. Co.*, 51 Minn. 193, 53 N. W. 544.

³ *Colf v. C., St. P., M. & O. R. Co.*, 87 Wis. 273.

² *Gier v. Los Angeles Con. E. R. Co.*, 108 Cal. 129.

in the habit of using the track in this way, yet it has never been supposed, and cannot be the law, that such custom would convert the track, which the law declares to be *per se* a dangerous place, into a safe place. Custom and usage may be relied upon to excuse the violation of a rule, when the act involved is not negligent in itself, but only by relation to the rule violated; and so when an act may be done in two or more ways, a resort to neither of which involves such obvious perils as raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent.¹

1168. It was said in reference to the act of a switchman riding on the platform in front of the boiler of an ordinary engine, while doing the work of a switch-engine, that the fact that upon switch-engines switchmen ride standing upon the platform provided for them in front of the engine, had no tendency to prove that the deceased was justified in riding in a sitting posture upon the cow-catcher of a road-engine; nor would the fact that switchmen were in the habit of riding upon the cow-catcher excuse the deceased, as between him and the defendant. (The defendant was the owner of a truck with which the engine collided.) If switchmen always rode there, still that fact would not take them without the rule of contributory negligence. When a safer place is provided and employees choose a more dangerous one, they do it at their own risk.²

1169. Where the evidence showed it was customary for plaintiff, a train inspector, to examine defendant's trains while in motion, and that while so inspecting a train another

¹ Warden v. Louisville & N. R. Co., 94 Ala. 277, 10 So. 276.

² Glover v. Scotten, 82 Mich. 369, 46 N. W. 936.

train came upon him unexpectedly and rapidly without such warning as he might expect to have; and his duty required him to work in dangerous places where it would be careless for ordinary persons to go, and there was a brakeman on the incoming train whose usual custom, in the proper discharge of his duty, would be to slacken the speed of the train or give sufficient warning to enable plaintiff to get out of the way, it was held that the exercise of due care on his part was one for the jury.¹

1170. Where the court refused to allow a witness to state what the custom was at the time of the accident in question to an inspector of cars who was injured while performing his duties under a car, by other cars being pushed in onto the track where he was at work, in letting cars into the yard on tracks and permitting them to run against standing cars, it was held that such question was proper. It was said he was constantly employed in the yard inspecting cars on the track, and, if such custom existed, that fact would have tended to show he knew it; and if he knew it, such evidence would have aided the jury in determining, under all the circumstances, the degree of care he observed and whether he was guilty of such negligence as to prevent a recovery.²

1171. It is negligence *per se* for a brakeman to jump from the pilot of a moving engine onto the track in front, to attend to a switch, and evidence that it was the custom on defendant's road and other well-regulated roads for brakemen, when doing switch work, to ride on the pilot and leave it in order to do the switching before the engine came to a full stop, is properly excluded.³

1172. Where it was the habit, upon the railroad where the plaintiff's decedent was employed, to uncouple the engine from the train at a certain station while the train was

¹ *Steffe v. Old Colony R. Co.*, 156 Mass. 262, 30 N. E. 1137.

³ *Andrews v. Birmingham Mineral R. Co.*, 99 Ala. 438, 12 So. 432.

² *Pennsylvania Co. v. Stoelke*, Adm'r, 104 Ill. 201.

in motion, and the decedent had, without protest or objection, contributed to the establishment of the custom, and its performance generally devolved upon and in the particular instance was voluntarily assumed by him, it was said that, having lent his aid to establish such a course of business, and afterwards, without complaint or protest, continued in the defendant's employ, he must be presumed to have taken upon himself all the risks incident to the conduct of the business in the manner which he assisted to establish.¹

1173. Where it was the uniform custom of a railway company to run its passenger trains between two prominent cities located close together at a rapid rate of speed, faster than a rate limited by an ordinance of the city, when the accident occurred, and an employee long in the service knew of such custom, and was killed while working about the construction of a wall and ditch at the side of the track by being run over by a rapidly-moving passenger train, it was held that he assumed the risk of continuing to work, and it was incumbent upon him to be mindful of danger and exercise sufficient care to avoid injury from passing trains.²

1174. Where it was not customary for the engineer of a switch-engine, in running through the company's yard, to ring the bell or blow the whistle, the omission to do so is not negligence so far as employees are concerned.³

1175. Where the evidence failed to disclose there was any rule forbidding the uncoupling of cars while in motion, and the evidence did disclose that it was the common custom to uncouple cars while in motion in this yard, and that it was not only done in the presence of the yard-master, but one of them, the night yard-master, was in the habit of doing it himself, and that the business could not very well be done without uncoupling cars in motion, and that it could have been done in safety in the present case had it not been for

¹ Kroy, Adm'r, v. C., R. I. & P. R. Co., 32 Iowa, 357.

³ Galvin v. Old Colony R. Co., 162 Mass. 533, 39 N. E. 186.

² Rutherford v. C., M. & St. P. R. Co., 57 Minn. 237, 59 N. W. 302.

an unblocked frog which was the cause of the injury, it was held that it was proper to show what was the custom in this respect, and the negligence of plaintiff was a proper question for the jury.¹

1176. It was held competent to show what was usually and habitually done in the running of trains, upon the ground that, if the company permitted a certain course of conduct, it ought not to be allowed to hold its employees to the very letter of its rules to shield itself from liability for that which it had permitted.²

E. Discovery of Servant's Peril — Precautions After.

1177. It was said the true doctrine, and that supported by many decisions of the court as well as the weight of authority in other jurisdictions, is that, notwithstanding plaintiff's contributory negligence, he may yet recover, if, in a case like this, the defendant's employees discover the perilous situation in time to prevent disaster by the exercise of due care and diligence, and fail, after the peril of plaintiff (this was a case for injury to one, not an employee, at a crossing) becomes known to them as a fact, and not merely after they should have known it, to resort to all reasonable effort to avoid injury.³

1178. A railroad company is liable, notwithstanding the negligence of an employee who is injured, if ordinary care was not exercised by its employees to prevent accident after they knew of such employee's negligence.⁴

1179. Where an instruction was subject to the objection that the jury might excuse the plaintiff's contributory negligence, if the fireman or engineer might, in the exercise of ordinary care, have seen the peril of an employee standing on the track in time to have avoided injury to him, it was

¹ *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645.

² *Hunn v. Railroad Co.*, 78 Mich. 513.

For other cases see EVIDENCE.

³ *Georgia Pacific R. Co. v. Lea*, 92 Ala. 262, 9 So. 230.

⁴ *Beems, Adm'x, v. C., R. I. & P. R. Co.*, 58 Iowa, 150; *Romick v. C., R. I. & P. R. Co.*, 62 Iowa, 167.

said: When the negligent act which causes an injury is done after the negligence of the injured party is known to the other party, and the injury could have been avoided by the exercise of reasonable care on his part, there is an exception to the general rule, and the contributory negligence of the injured party will not defeat a recovery. (Citing *Morris v. Railway Co.*, 45 Iowa, 29; *Deeds v. Railway Co.*, 69 Iowa, 164; *Romick v. Railway Co.*, 62 Iowa, 167; *McKean v. Railway Co.*, 55 Iowa, 192; *O'Rourke v. Railway Co.*, 44 Iowa, 531; *Cooper v. Railway Co.*, id. 138; *Spencer v. Railway Co.*, 29 Iowa, 55.)

This exception depends upon the failure of the person who is sought to be made liable for the injury to use reasonable care to avoid it after the negligence of the other party is known. It is not sufficient that means of knowledge were available and not used, unless in exceptional cases. To extend the exception would in effect ignore the doctrine of contributory negligence and make the defendant absolutely liable.¹

1180. Where injury is threatened to a person who has negligently placed himself in a situation of danger, if the question arises as to the measure of care it was the duty of another to have observed in case it was within his power to have avoided the consequences of the plaintiff's negligence, then in order to charge the defendant it must be shown he had knowledge of the peril in which plaintiff had placed himself or the equivalent of such knowledge, at least long enough before the injury was inflicted to have enabled him to form an intelligent opinion as to how the injury might be avoided and to apply the means.²

1181. It was said that the rule relating to the liability of a party, notwithstanding the contributory negligence of the plaintiff, is only applicable after the discovery by such party of the peril in which the plaintiff is placed; and ordinarily does not apply where such party might, with the exercise

¹ *Keefe v. C. & N. W. R. Co.* (Iowa), 60 N. W. 503. ² *C., B. & Q. R. Co. v. Johnson*, Adm'r, 103 Ill. 512.

of ordinary care, have discovered the plaintiff to be in such peril, but in fact did not. (Citing *Cooley on Torts*, sec. 674; *O'Keefe v. Railway Co.*, 32 Iowa, 467; *Yarnall v. Railway Co.*, 75 Mo. 575; *Denman v. Railway Co.*, 26 Minn. 357; *Button v. Railway Co.*, 18 N. Y. 248; *Coasting Co. v. Tolson*, 139 U. S. 551.)¹

1182. An engineer of a train following a hand-car is not required to use efforts to stop the train, unless it appears to him that the section-men on the hand-car are not aware of the approach of the train, and are not likely to leave the track in time to prevent a collision. Such engineer has a right to suppose that the section-men know that the train is approaching.²

1182a. Where both the engineer and fireman saw an employee working on the track when forty yards from him, and observed that he was probably unaware of their approach, and made no effort to stop the engine, it appearing that the noise from an engine near by prevented such trackman from hearing the approach of such engine, it was held that, notwithstanding his own negligence, he was entitled to recover.³

1183. The rule was stated and applied where an employee went between moving cars to uncouple them and the employees operating the train knew of his position.⁴

1184. To render a railroad company liable on the ground of gross negligence to an employee who was injured by a passing train, while sitting near the track in an unconscious condition, it must be shown that the engineer saw him in time to avoid the accident; the fact that the engineer could have seen him is not sufficient.⁵

1185. If the person charged with the duty consciously fails or refuses to exercise reasonable care to prevent an injury

¹ *Newport News & M. V. Co. v. Howe*, 52 Fed. 362 (C. C. A.).

⁴ *Romick v. C., R. I. & P. R. Co.*, 62 Iowa, 167; *Beems v. C., R. I. & P. R. Co.*, 67 Iowa, 435.

² *Nelling v. C., St. P. & K. C. R. Co.* (Iowa), 67 N. W. 404.

⁵ *Robinson v. Louisville & N. R. Co.* (Ky.), 24 S. W. 625.

³ *Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 341, 33 S. W. 960.

after the discovery of peril, or under circumstances when he is chargeable with knowledge of such peril, and injury results, he will be guilty of wilful injury, or such wanton negligence as to be its equivalent. If such person, after the discovery of the peril of a co-employee, in good faith exercises due diligence and care, or adopts the means he believes to be the best to prevent an injury, and injury results notwithstanding, it cannot be said he is guilty of simple negligence or of intentional or wilful wrong.¹

1186. The rule is thus stated: "If defendant knew of the plaintiff's peril in time to have prevented the injury, and could have prevented it by the use of means then under its control, and negligently failed to apply the means to prevent the injury, and plaintiff was injured in consequence of such negligence, he would be entitled to recover, notwithstanding plaintiff may have been guilty of negligence, provided that plaintiff did all he could to prevent the accident and save himself from harm after he became aware of his peril."²

1187. If a conductor has reason to believe that a brakeman may attempt to board a moving train, the rule that contributory negligence will not be a defense if, after the discovery of the position of peril, the injury could be avoided by the exercise of proper care, would not apply so as to require him to stop or slacken the speed of the train, as he would have the right to assume that such brakeman would not attempt the act unless the speed was such that it could be accomplished with safety.³

1188. The rule was extended by the Iowa court so that if the master might, in the exercise of ordinary care, have discovered the plaintiff's peril after he had negligently assumed it, but did not, contributory negligence will not prevail as a defense. This was held where an employee was injured while stepping between an engine and car to uncouple them,

¹ Louisville & N. R. Co. v. Markee, 103 Ala. 160, 15 So. 511.

³ Louisville & N. R. Co. v. Wallace, 90 Tenn. 53, 15 S. W. 921.

² Louisville & N. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130.

and in so doing the pilot of the engine struck his leg, carrying him to where there was a frog in the track, into which his foot caught, and where the charge was that the engineer and firemen were negligent in not discovering his peril by observing that he was on the pilot before his foot was caught.¹

1189. It was held, where the tracks of different railway companies ran parallel in a railroad yard, that the employee of one such company, in standing upon the track of the other to give signals to a train upon which he was an operative, was not obliged to look and listen for trains moving upon such track. It was further held that the duty of one such company towards the employees of the other was the same as in respect to its own.

The defendant was held liable upon the ground that the engineer or fireman failed to see him, or, if seeing him, failed to stop the engine until he should get through with his signals. (Such is the effect of the decision,—that such employees upon the engine must look out for him, but he was under no obligation to look out for the train.)²

F. Haste and Diverted Attention—Effect of.

1190. Persons in the control of railroad trains have a right to presume that men of experience will act reasonably in all given contingencies. They are not bound to anticipate and provide against extraordinary, unusual and improbable conditions which involve inattention on the part of others; and their duty to persons who are thus situated only begins when they have good reason to suppose that such persons are unnecessarily in peril, or disabled from avoiding it. It is a presumption that a person of mature age and in possession of his faculties will exercise care for his own safety, and that he will not go to or remain in a perilous position when a slight effort would carry him to

¹ *Neville v. C. & N. W. R. Co.*, 79 Iowa, 232.

² *McMarshall v. C., R. I. & P. R. Co.*, 80 Iowa, 757.

a place of safety. Accordingly, a watchman or lookout on a train moving slowly, with bell ringing, may presume, when he observed a man walking soberly on or near the track, that such person has observed the train, if by the exercise of care he could have observed it. He may therefore reasonably presume, unless something indicates the contrary, that the person on the track will step aside so as to avoid any injury. It was said by the court: "We do not assent to the view that an experienced switchman, acquainted with the peril attending the performance of his duty at a particular locality, is, because of the nature of his employment, exempt from the obligation of exercising the same degree of diligence for his own safety, in respect to the trains of other railroad companies, as would be required of a traveler or other person rightfully at the same place."¹

1191. Where an employee was working under the immediate supervision of his employer, who was spurring him to hurry the work, it was said: The employee will not be held to the same measure of care that would be required of him if the circumstances afforded opportunity for more deliberate care.

It was held that where such an employee working in a dangerous employment was injured by an accident which probably would not have happened except for the haste urged by the employer, that the question of contributory negligence was one for the jury.

The facts were that the employee failed to observe that planks had been removed over a space through which he was engaged with tackle and horse in hoisting timbers. They fell from contact with such timbers causing him injury.²

1192. Where a brakeman while in the performance of his duties, by reason of its icy and slippery condition, in stepping upon the end board of a coal car, which was lying inward on the car, being attached to the end of the car by hinges, slipped and was injured, it was held, there being no

¹ Cincinnati, I. & St. L. etc. R. Co. v. Long, 112 Ind. 166, 13 N. E. 659.

² Lee v. Woolsey, 109 Pa. St. 124.

evidence that he knew of the condition of the board until he approached it at the time, that whether he was justified in passing over it would depend upon the haste required in the performance of the duty in which he was engaged.¹

1193. Where it was claimed by a brakeman that he was required to catch a car when running at a dangerous rate of speed, that the lantern furnished was so defective that the light was blown out, and the ground was rough and uneven, and such conditions resulted in his foot slipping while attempting to climb upon the car, yet as he was acting under orders and in an emergency, which offered him no time for reflection, it was held he was not chargeable with contributory negligence.²

1193a. Where an employee working upon the track of a logging railroad was injured in an attempt to remove a tie from the track in the face of an approaching train at the signal of the engineer, the train at the time being only about eighty feet away and running at a speed of twenty miles an hour, it was held that his conduct was rash and reckless as matter of law, and the fact that he was directed by the engineer to do the act, or that it was done to protect those upon the train, was no excuse. That under the circumstances self-preservation was his paramount and absolute duty.³

1194. It was held that a switchman who, while operating a hand-car, stopped to throw aside a hammer lying upon the floor of the car and was struck by the lever, was guilty of such contributory negligence as would preclude a recovery.⁴

1195. Where a girl seventeen years old, inexperienced, having worked on the machine only one afternoon before she was hurt, was set at work without instructions, and there was a rule that if leather got caught in the machine a

¹ *McDermott v. I. F. & S. C. R. Co.*, 85 Iowa, 180.

³ *Writt v. Girard Lumber Co.*, 91 Wis. 496.

² *Fox v. C., St. P. & K. C. R. Co.*, 86 Iowa, 368.

⁴ *Jones v. Louisville & N. R. Co.*, 95 Ky. 576, 26 S. W. 590.

certain person should be called, and, such condition happening, such person was called and relieved the machine, and swore at her and told her if the machine got stuck again to fix it herself, which was said in the hearing of defendant; and it further appeared that she was about to ask him (defendant) some questions, but he refused to listen and told her to work fast or he would send her home, and being thus frightened she worked faster, and when the machine got stuck again she tried to relieve it and her hand was caught, it was held that there was a sufficient showing that she was in the exercise of due care.¹

1196. While an employee, while pulling a car in the defendant's yard facing a ditch which had been dug across the track, was injured by falling into it, and it appeared that it was day-time, and the ditch was in plain sight, and he would have seen it had he looked, it was said it could not be held, as matter of law, that he was guilty of contributory negligence. His work may have caused him to bend forward and also engross his attention. That in all cases arising from visible defects in ways such as this was, whereby the plaintiff was injured, it never has been held, as matter of law, negligence on the part of the plaintiff that he did not see the defect and avoid it.²

1197. An instruction to the effect that notwithstanding the deceased was engaged in a dangerous business, requiring constant and watchful care upon his part to save himself from injury, still, if he did not always bear these things in mind and act upon them, and was thereby injured, he could recover, was held to be erroneous. Where there was no evidence showing sudden danger or emergency, and the only danger was the ever-present one incident to the coupling of cars, an injury received under such circumstances would be the direct result of contributory negligence, which would defeat a recovery.³

¹ *Connors v. Grilley*, 155 Mass. 575, 80 N. E. 218. *Mfg. Co.*, 153 Mass. 468, 27 N. E. 179.

² *Gustafsen v. Washburn & Moen* ³ *Martin v. California Central R. Co.*, 94 Cal. 326.

1198. Where an employee was directed by the foreman of a gang of men to assist in pushing a car over an unfinished portion of the track which was near a high bank, and he took hold on the side towards the bank and was caught between the bank and the car and injured, and it appeared that he had not been warned of the danger, and that he did not know of the narrow place, and had no time for deliberation or to look ahead, it was held the jury were warranted in finding that the defendant was negligent in not providing a safe place for the plaintiff to work, and in failing to warn him of the danger, and that plaintiff was not guilty of contributory negligence.¹

G. *Railroads, Operation of.*

1. Coupling Cars.

1199. It was held that it was not contributory negligence as matter of law for a brakeman to run upon a platform by the side of the track (boxing covering signal-wires) in the night-time while coupling cars. He was injured by a loose board, whereby he was thrown under the cars.²

1200. It cannot be said as matter of law that an employee of a railroad company who, after giving the proper signal for the train to stop, steps upon the track to make a coupling without watching to see whether the signal will be obeyed or not, is guilty of contributory negligence in so doing, but the question is a proper one for the jury.³

1200a. It was declared negligence as a matter of law for a brakeman to go between cars in the night-time to couple them without giving a signal to the engineer.⁴

1201. Where a brakeman attempted to pick up a coupling-pin from the track as a train was slowly backing towards

¹ *Stackman v. C. & N. W. R. Co.*, 80 Wis. 428.

For other cases, see ASSUMED RISK.

² *Sweat v. Boston & Albany R. Co.*, 156 Mass. 284.

³ *Bucklew v. Central Iowa R. Co.*, 64 Iowa, 603; *Beems v. C. & N. W. R. Co.*, 58 Iowa, 150; *Berry v. Central R. Co.*, 40 Iowa, 564.

⁴ *Atchison, T. & S. F. R. Co. v. Alsdorf*, 56 Ill. App. 578.

him, after having first signaled the fireman, who was in charge of the locomotive, to stop, and he was injured by the failure of the fireman to obey the signal, he was held free from contributory negligence.¹

1202. The fact that a brakeman undertook to make a coupling under circumstances more dangerous than usual, and was injured in the attempt, was said not to be conclusive that he was guilty of contributory negligence.²

1202a. A brakeman who stands upon a dead-wood only four inches wide, without anything to support him, assuming that position while engaged in uncoupling cars for the purpose of signaling the engineer, is guilty of contributory negligence where injured in falling from the beam.³

1202b. Where an experienced switchman was injured while attempting to uncouple cars in motion, and it appeared that on finding a tight pin he signaled to the engineer to back and continued to walk along between the cars, attempting to remove the pin, until his foot caught in an open switch which he had left open, it was held that he was guilty of contributory negligence.⁴

1202c. It was held to be negligence on the part of a brakeman in attempting to withdraw a coupling-pin to stand with one foot on the bumpers of each car, leaning forward to withdraw the pin with his right hand, having a lantern in the left, he falling between the cars by reason of their separating. The pin had already been withdrawn by a fellow-brakeman.⁵

1203. Where the petition alleged that the employee was injured while in the performance of his duties in uncoupling certain cars then in motion, it was held that it being *prima facie* negligence to go between cars of a moving train, such allegation not stating any circumstances, either of special or

¹Steele v. Central Railway, 43 Iowa, 109.

²Baird v. C., R. I. & P. R. Co., 61 Iowa, 359.

³Dooner v. Delaware & H. Canal Co., 171 Pa. St. 581.

⁴Houston & T. C. R. Co. v. Crawford (Tex. App.), 32 S. W. 155.

⁵Young v. West Virginia C. & P. R. Co. (W. Va.), 24 S. E. 615.

ders, general duty or the necessity of the case, which required plaintiff to go between the cars, or the rate of speed of the train, negligence appeared on his part and rendered the petition bad.¹

1203a. An employee was not justified in attempting to uncouple a car while in motion, in the absence of an emergency, upon the mere direction of his foreman, who was five or six car lengths away, to cut off one car.²

1204. Where a brakeman knows a car is improperly loaded, or it would be plainly manifest if he would look, and he does not look when he has a duty to perform that calls his attention to it, the rule of contributory negligence applies.³

1205. The foregoing case was distinguished, and it was held that where the employee did not know that the car was improperly loaded, and it was located in the center of the train, and his attention was necessarily directed to the giving of the signals, contributory negligence did not appear.⁴

1206. Though attempting to couple cars when the engine is running at a speed of fifteen miles an hour is apparently not only dangerous, but reckless, yet if it be true in the experience of engineers and railroad men that it is safe, provided the engine is properly managed, and if the failure in question resulted solely from the fault of the engineer in manipulating the engine, the high speed will be no obstacle to a recovery by the car-coupler for a personal injury sustained by him in making the attempt. Though to non-experts, its truth would seem in a high degree improbable, if not impossible, yet there being direct and positive evidence tending to support the theory of safety, the court erred in granting a nonsuit.⁵

¹ Parrott v. New Orleans & N. E. R. Co., 62 Fed. 562.

⁴ Louisville & N. R. Co. v. Robinson (Ky.), 16 S. W. 707.

² Davis v. Western Railway of Alabama (Ala.), 18 So. 173.

⁵ Rebb v. East Tenn., V. & G. R. Co., 87 Ga. 631, 13 S. E. 566.

³ Brice v. Railroad Co. (Ky.), 9 S. W. 288.

1207. A brakeman who, in coupling cars with knowledge that the couplings are mismatched, places the pin in the moving car and remains between the two cars to shake the pin into position, when he might have safely made the coupling by placing the pin in the standing car and permitting it to be shaken into position by the concussion of the two cars, is guilty of negligence, and recovery will be denied for his death resulting from being crushed between the two cars.¹

1208. If it becomes the duty of a brakeman to go between cars in uncoupling, it is also his duty not to put himself where the dead-woods come together. The engineer has a right to presume that he will keep himself outside of the dead-woods. *Railroad Co. v. Watson*, 90 Ala. 68, and *Hissong v. Railroad Co.*, 90 Ala. 514, distinguished upon the ground that the engineer knew the perilous position of the employee.²

1209. Where a brakeman had his hand crushed between dead-blocks while coupling cars, and it appeared that he saw the cars were coming too fast for safe coupling, and signaled for them to be stopped, but, notwithstanding his signal was not obeyed, he stepped in between them to make the coupling and was injured, it was held that when he saw his signals had not been obeyed it was his duty to stay out, and it was negligence for him to go in between the cars.³

1210. It was said of a brakeman, injured while engaged in coupling cars, that if he knew that the cars were moving too fast to make a safe coupling he assumed the risk. If he believed they had been brought to a safe speed, then he did not.⁴

1211. A brakeman in defendant's employ, while engaged in coupling a car received from another road to cars on defendant's track, was injured resulting from the fact that the

¹ *Norfolk & W. R. Co. v. McDonald's Adm'r*, 88 Va. 352, 13 S. E. 706.

² *Alabama G. S. R. Co. v. Richie*, 99 Ala. 346, 12 So. 612.

³ *Norfolk & Western R. Co. v. Cottrell*, 83 Va. 512.

⁴ *Henry v. Sioux City & Pac. R. Co.*, 66 Iowa, 52.

bumper of said car was out of order, so that it hung lower than the one of the car to which it was being coupled. It appeared that it was customary in coupling cars with bumpers of different heights to use a crooked link, and that such links were supplied by defendant and were in the caboose of plaintiff's train. It was held that the furnishing of such links did not fill the measure of defendant's obligation. That the duty of examination to ascertain whether the coupling appliances were in proper condition rested in the first instance upon the master, and in the absence of evidence to that effect it could not be presumed that it had been devolved upon the plaintiff; and unless it had, he had the right to assume that the master's duty had been performed.

It appeared that when the cars were four or five feet apart the plaintiff saw that the bumper on the moving car was lower than the bumper of the stationary car, but it did not appear that he observed that it would pass under the bumper on the stationary car, but on the contrary that he thought the coupling could be made with the straight link. It was only at the moment that the cars were about to collide that he discovered his error.

It was said: The court cannot affirm that for such an error of judgment, induced as it was to some extent by defendant's neglect, he is to be held to have been careless. Under such circumstances, where the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of danger that confronts him. If he acts the part of a prudent man willing to and intending to perform the duty to which he has been assigned, he has done all the law demands of him, and whether he acted such a part under the circumstances of this case was for the jury to determine.¹

1212. A switchman about to make a coupling, who knows that the engineer has not in obedience to his request slowed up or stopped the train when within a few feet of the car to be coupled, and who knows that the train is running at a

¹ Goodrich v. N. Y. C. & H. R. R. Co., 116 N. Y. 398.

dangerous rate of speed, is negligent as matter of law in staying between the cars to make the coupling, and a finding to the contrary will be set aside.¹

1213. The fact that a brakeman who steps between a moving car and an engine in order to uncouple them, and slips on the ice on the track, believes that this is not an imprudent thing to do, and has good ground as a reasonably prudent man for so believing, does not relieve him of contributory negligence.²

1214. Where a train crew of which deceased was a member was making a kicked switch, prohibited by the rules of the company unless absolutely necessary, and it appeared deceased ran in front of the cars to arrange their couplings, and catching his foot in the frog of a switch was killed, it was held that he was guilty of contributory negligence, preventing a recovery.³

1215. Where a brakeman in the employ of a railroad company received a serious personal injury in attempting to change a link attached to an engine while it was in motion over an unballasted part of a side-track, the ties being above the ground, whereby he caught his foot between one of the ties and the brake-beam at the rear end of the tender, the engine backing to attach to empty cars, and was thrown down and injured, and it appeared this occurred in broad daylight, so that he must have seen the condition of the track, and that he did not have the engine stopped before going upon the track, as he might have done, and the proof failed to show that common prudence required the ballasting of such a side-track, used only for standing cars, it was held that the brakeman could not recover against the company for his injury, by reason of his own negligence.⁴

1216. Where there was testimony that it was customary to step in between the cars to couple or uncouple them, and

¹ Kennedy v. Lake Superior T. & T. R. Co., 37 Wis. 28, 57 N. W. 976. ³ Sheets v. Chicago & I. Coal R. Co., 139 Ind. 682, 39 N. E. 154.

² Pieart v. Chicago, R. I. & P. R. Co., 82 Iowa, 148, 47 N. W. 1079. ⁴ Pennsylvania Co. v. Hankey, 93 Ill. 580.

that whether a man stepped in between the rails depended on circumstances, and that the chances were just as good in between the cars and the rail as on the outside; that if the pin stuck, one could not always stand outside the track and rail and pull it out, and that when the plaintiff went in to pull out the coupling-pin it stuck, and he walked along between the cars, which were moving slowly, trying to pull the pin out and uncouple the cars, as the conductor had directed him to do, and did not think anything at all about the switch (his injury was caused by his foot getting caught between a tie and switch-rod), it was held that he was not, as matter of law, negligent.¹

1217. It has never been held in Michigan that stepping between cars to uncouple them while they were in motion was as matter of law negligence. It has generally been held a question for the jury.²

2. Moving Cars—Mounting and Alighting from.

1218. It was held to be negligence on the part of a brakeman to jump from a moving train without first looking to see that there are no obstructions which render the act dangerous. He is presumed to know there is a liability that obstructions might exist which render the act dangerous.³

1219. A railroad employee on the pilot of an engine moving backwards, and drawing freight cars, is guilty of contributory negligence where, without real necessity therefor, he steps off in the dark and at a place with which he is unacquainted, without using his lantern, which he has in his hand, and by the use of which he could see a low embankment so close to the track as to render an attempt to alight dangerous.⁴

1220. It was held to be negligence on the part of a brakeman to jump from the tender of his engine and walk back

¹ *Hannah v. Conn. Riv. R. Co.*, 154 Mass. 529, 28 N. E. 682.

² *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645.

³ *Thompson v. Boston & Maine R. Co.*, 153 Mass. 391.

⁴ *Burgin v. Louisville & N. R. Co.*, 97 Ala. 274, 12 So. 395. See *Colf v. Railway Co.*, 87 Wis. 273.

in front of the engine while it was moving to couple cars.¹

1221. Where a brakeman upon a gravel train left the train for purposes of his own and voluntarily attempted to get aboard while its speed was not sufficiently checked up to permit this to be done with safety, and in making the attempt he seized the rim of the gravel-box, which from defect of material broke and caused him to fall, whereby he was injured, it was held that he was guilty of such a want of ordinary care as would preclude a recovery.²

1222. The court said that after an examination of all the citations with which they had been favored they reached the conclusion that it is not a rule of universal application that a person must be deemed negligent whenever he attempts to leave a train while it is in motion. It was held that where a train containing a party of laborers slowed up so that it was moving about four miles an hour at a platform only twelve or sixteen inches below the step of the car, and all but one of the party had safely alighted, and such one, being ordered by the conductor to get off, did so, and was injured in so doing, that the question of his negligence under the circumstances was a question for the jury.³

1223. Where a fireman upon a switch-engine attempted to get on the tender while it was slowly moving and the hand-hold gave way on account of its being insecurely fastened, throwing him to the ground, causing injury, and it appeared there was a step on the cab of the engine intended for the use of the engineer and fireman in getting on and off the engine, it was held that the plaintiff, in imprudently mounting the tender at the end approaching him, contrary to the orders of the company, and failing to wait and get onto the cab, was guilty of contributory negligence.⁴

¹ *Finnell v. D., L. & W. R. Co.*, 129 N. Y. 669; *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588.

² *Timmons v. Central Ohio R. Co.*, 6 Ohio St. 106.

³ *Northern Pac. R. Co. v. Egeland*, 56 Fed. 200 (C. C. A.).

⁴ *Murray v. Gulf, C. & S. F. R. Co.*, 73 Tex. 2, 11 S. W. 125. See, also, *Dowell v. Railway Co.*, 61

1224. Where an employee attempted to mount the rim, one and one-half inches broad, around the pilot of an engine, and stand on a space only an inch and a half broad while the engine was moving at the rate of four or five miles an hour, it was held that it was an act of negligence, if not gross negligence.¹

1225. Where an employee attempted to mount an engine running at the rate of from six to twelve miles an hour, it was held that such attempt was negligence; that any man of common sense would have known that it was a rash and dangerous attempt. The fact, if it existed, that he was ordered to do so by his superior would not relieve him from the duty, as the act was so rash and dangerous he was not obliged to obey.²

1226. It is negligence *per se* for a brakeman to jump from the pilot of a moving engine onto the track in front to attend to a switch, and evidence that it was the custom on defendant's road and other well-regulated roads for brakemen, when doing switch work, to ride on the pilot and leave it in order to do the switching before the engine comes to a full stop, is properly excluded.³

1227. Where an employee was injured while jumping from a pay-car, moving at the rate of from four and a half to five miles an hour, which car he had entered to receive a sum due him, and which was started before he had time, after payment, to get off, it was held that it could not be said as matter of law that the act was negligence, but rather it was a question for the jury. It was said: It is doubtless a well-settled general principle that if a passenger or other person lawfully on the train, without any direction from the conductor or other person in authority over the train, voluntarily incurs danger by jumping from the train while in motion, the railroad company is not responsible for injury

Miss. 519; *Chambers v. Railway Co.*, 91 N. C. 471.

² *Roul v. East Tenn., V. & G. R. Co.*, 85 Ga. 197, 11 S. E. 558.

¹ *Mayfield v. Savannah, G. & N. A. R. Co.*, 87 Ga. 374, 13 S. E. 459.

³ *Andrews v. Birmingham Mineral R. Co.*, 99 Ala. 438, 12 So. 432.

resulting therefrom; but if the motion of the train is so slow that the danger of jumping off is not reasonably apparent, and the passenger or other person acts under the direction of the conductor or other person in authority, then the defense of contributory negligence is unavailing, and it is for the jury to determine whether the danger of leaving or boarding a train when in motion is so apparent as to make it the duty of the passenger or other person to desist from the attempt.¹

1228. Where a brakeman was injured in the attempt to mount a moving engine by missing the steps and falling upon the rail in the night-time, and his contention was that the step was unusually high, and it appeared that it was within his power and he had the right to stop the train, and was familiar with the condition of the step, it was held that he was guilty of contributory negligence, which would prevent a recovery.²

1229. Walking over a train of flat-cars while the train is in motion, or even stepping from one of such cars to another while the train is in motion, is not negligence *per se*, as all the cars in such case are moving at the same rate of speed; and, as the person walking over them is carried along with them and partakes of the same motion, there is usually but little danger in walking over them or in stepping from one car to another. Even stepping from a train of cars in motion to a stationary platform or to the ground, which is more dangerous, is not always culpably dangerous, and is not negligence *per se*. The question of negligence in such cases is usually a question of fact for the jury, although sometimes a question of law for the court.³

1230. Where an employee of a railroad company was injured while attempting to board the pilot of an engine pursuant to the directions of his superior, and in so doing his

¹New York P. & N. R. Co. v. Coulbourne, 69 Md. 360, 16 Atl. 208. ³Atchison, T. & S. F. R. Co. v. McCandliss, 33 Kan. 366, 6 Pac. 587.

²New York, L. E. & W. R. Co. v. Lyons, 119 Pa. St. 324, 13 Atl. 205.

clothes caught in the splinter of a frayed rail, whereby he was thrown and injured, it was said that the mere fact that he was acting under the orders of his superior would not alone justify his conduct. He was still bound to the use of reasonable care for his own security, and if he failed in such care or performed the act in reckless indifference to his own safety, the consequences are chargeable to him; such care required that he should look for and avoid any such special dangers.¹

1231. Whether it was negligence for an employee to board a moving car in the usual and proper manner for discharging his duties, as he claimed, was held a question for the jury.²

1232. Where it appeared that it was the plaintiff's duty to mount a car as it was kicked past him, and the negligence alleged was that the fireman caused it to be moved at too great speed, so that the plaintiff was unable to stop it in time to avoid a collision with other cars, it was held not error to refuse an instruction that if the plaintiff, by the exercise of ordinary care, could have known that the car was going at a swift and dangerous speed at the time he attempted to get on the same, and with knowledge of this he mounted said car, he was guilty of contributory negligence, since, as plaintiff's work was necessarily attended with danger, to render him negligent the car must have attained such a dangerous speed that a prudent person in plaintiff's position would not have boarded it.³

1233. Where the record fails to show whether it is customary and prudent for switchmen to mount cars while in motion to uncouple them, it cannot be said as matter of law that plaintiff was guilty of contributory negligence in so doing.⁴

1234. Where an employee was injured while attempting to mount a car which had no steps to set a brake, such brake

¹ *Cornwall v. Charlotte C. & A. R. Co.*, 97 N. C. 11.

² *Lawson v. Truesdale*, 60 Minn. 410, 62 N. W. 546.

³ *Texas & Pacific R. Co. v. Reed* (Tex.), 31 S. W. 1058.

⁴ *Rutledge v. Missouri Pac. R. Co.*, 110 Mo. 312, 19 S. W. 38.

being out of order, and while his feet were upon the brake-beam and his hands upon the brake-rod the engine to which the car was to be attached came back against the car with such force that a car-coupler could not make the coupling, and the force of the collision threw plaintiff from the car, and he was pushed along by the brake-beam about two hundred feet, when the car passed over him, causing him injury; and it appeared that it was customary to have the brakes set on such cars to prevent their being moved, and that if brakes had been set on this car it would not have been moved more than five or ten feet, it was held that the defective brake was the proximate cause of the plaintiff's injury; that it could not be said as matter of law that plaintiff was guilty of contributory negligence.¹

3. Place of Duty — Absence from, when Injured.

1235. It is incumbent upon a railroad employee, whose duty requires him to ride upon one of the company's trains, to ride in such places as the company has provided for such purpose, and, if he is injured while riding in a more dangerous position, the law will presume that his negligence contributed to such injury. But this presumption may be overcome by evidence that such employee occupied such dangerous position through no fault or negligence of his own and not of his own free will.

This was said where a switchman, in getting upon a caboose-car at the front end, found the door locked, and, the platform being crowded with a number of his fellow-workmen, he sat upon the second step of the platform with his feet on the lower step, and by a sudden lurch of the car some portion of his person was forced beyond the line of the car and came in contact with a switch-stand close to the track. It was held that the question of his negligence was proper for the jury.²

¹ *Lilly v. New York C. & H. R. R.*
Co., 107 N. Y. 566.

² *Boss v. Northern Pacific R. Co.*,
2 N. Dak. 128, 49 N. W. 655.

1236. An employee of a railroad company who voluntarily leaves his post and is injured while upon another part of the train where the exposure is greater is guilty of negligence.¹

1237. Where a workman upon a construction train, instead of riding in the place prepared for him — a box-car — of his own will, and after having been forbidden, rode on the pilot of the engine, when the train in passing through a tunnel collided with some cars negligently left standing on the track, causing him injury, while those in the box-car were unhurt, it was held that he was himself the author of his misfortune and it was due to his own recklessness and folly.²

1238. It was held that an employee could not recover for injuries received by cars coming together by reason of being slightly beyond the control of the brakemen, who were letting them down grade, where he was sitting on the end of one of the cars with his feet hanging over the sides, when his proper position, if on the cars, was in the caboose.³

1239. Where a conductor was injured while climbing over the top of a car when the train was under way, it just having started from the station, by contact with an overhanging awning of the station-house, it not appearing that his act at the time in so doing had any necessary connection with his duties as conductor, it was held that he was guilty of contributory negligence.⁴

1240. Where a brakeman whose place of duty, under the rules, at the time of the accident was in the middle of the train, but, anticipating a possible obstruction in the way — an engine upon the track, — he went forward to put the engineer upon his guard, it was held that he could not be charged in so doing with contributory negligence.⁵

¹ O'Neill v. Keokuk & Des Moines R. Co., 45 Iowa, 546.

⁴ Gibson, Adm'x, v. Erie Railway Co., 63 N. Y. 449.

² Railroad Co. v. Jones, 95 U. S. 439.

⁵ Somerset & C. R. Co. v. Galbraith, 109 Pa. St. 32.

³ St. Louis, etc. R. Co. v. Schumacher, 152 U. S. 77.

1241. Where the immediate cause of an injury was the derailing of a train, and that was caused by the manner in which it was being run and the condition of the track, it was held that the mere fact that a brakeman who was injured was at the time of the accident in the engineer's cab, instead of at the brakes, which was his place of duty, was not such contributory negligence as to defeat a recovery for his injuries, when it did not appear that his absence from the brakes contributed to the injury nor that he was thus exposed to greater danger, even though it happened that no one was injured except those who were on the engine.¹

1242. Where a brakeman was riding in the cab of the engine at the time it left the track, it was held that no action would lie against the company, even though the cause of the accident was the defendant's negligence as to its condition.²

1243. It was held to be contributory negligence on the part of a brakeman to ride between freight cars, where he was injured by the engine coming in collision with cattle on the track, such place not being his post of duty and his act being prohibited by the rules.³

1244. The court decided to hold as matter of law that an employee, in placing his foot on the draw-bar or link of a car at a time when he has good reason to believe there may be a sudden movement of the train, is guilty of contributory negligence.⁴

1245. A brakeman was employed upon a freight train running between points seventeen miles apart. His duty was, while the train was moving, to attend brakes on the top of the cars, and when arriving at intermediate stations to attend the switches, where cars were to be left or taken. While the train was proceeding between stations at the time of his injury, he was sitting on the cross-beam of the

¹ *Connors, Adm'x, v. B., C. R. & N. R. Co.*, 71 Iowa, 490. *Player v. Railway Co.*, 62 Iowa, 723, distinguished.

² *Connors v. B., C. R. & N. R. Co.*,

74 Iowa, 383. *Connors v. Railway Co.*, 71 Iowa, 490, distinguished.

³ *McAunich v. Miss. & Mo. R. Co.*, 20 Iowa, 383.

⁴ *Boyle v. C., R. I. & P. R. Co.*, 56 Iowa, 765.

engine, with his legs hanging over the cow-catcher, when the pilot came in collision with a rail of a bisecting road. It was said that the investigation of the court had failed to discover a case where the act of riding on the pilot was not negligence *per se*. It is laid down as a general proposition that the act of riding on an engine without a necessity so to do is contributory negligence *per se*, which will defeat recovery for injuries resulting from collisions and the like.¹

1246. Where an employee of the defendant railroad company, while being transported to the place where his services were required along with other employees on an engine provided by the company, sat with one or two others on the front of the engine with his feet hanging over the pilot, and was injured by a collision with another engine, it was held, on a motion to instruct the jury to find a verdict for the defendant, (1) that the plaintiff himself so far contributed to his injury by his own negligence in placing himself in such a dangerous position that he could not recover; (2) and there being evidence that there was no room for the plaintiff on the tender, and that he had in effect been authorized or invited by the company to ride on the pilot, that the plaintiff being of age and able to see and know the risks of the position, even the fact of such invitation and authorization would not justify him placing himself in a position of obviously great risk and danger.²

1247. A switchman while riding in a railroad yard upon the cross-beam of the pilot of an engine upon which he was employed, with his feet hanging down over the cow-catcher, was killed in a collision of such engine with a truck and team owned by the defendant, who was an individual not in the employ of the railway company. He had no duties to perform with the engine, his duty being to attend to the switching of tracks in front of the engine, getting on and off the cars for that purpose. It was said: The plaintiff's right to recover was barred by his decedent's contributory

¹ Warden v. Louisville & N. R. Co., 94 Ala. 277, 10 So. 276.

² Kresanowski v. Railroad Co., 18 Fed. 229.

negligence. He was neither required nor directed to ride in a position which every person of ordinary intelligence and observation knows was the most dangerous he could have chosen. The fact that upon switch-engines switchmen rode upon the platform provided for them in front of the engine had no tendency to prove that the deceased was justified in riding in a sitting posture; nor would the fact that switchmen were in the habit of riding upon the cow-catcher excuse the deceased as between him and the defendant.¹

1248. Where an employee on a construction train, while riding on the pilot of the engine, was injured in a collision with other cars on the track, it was said: The plaintiff had been warned against riding on the pilot and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car; he should have taken his place there. The knowledge, assent or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late and he must hurry, this was no justification for taking such a risk; as well might he have obeyed a suggestion to ride on the cow-catcher or put himself on the track before the advancing wheels of a locomotive. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit.²

1249. Where a brakeman, engaged in the duties of switching in a railroad yard, while standing on the platform of an ordinary road-engine, provided and used for switching purposes, in front of the boiler-head, and behind the pilot-beam, was injured by the force with which the engine was driven against loaded cars, it was held that the question as to whether that position was one of danger and voluntarily chosen by the deceased, and whether it was the usual cus-

¹ *Glover v. Scotten*, 82 Mich. 369,
46 N. W. 936.

² *Baltimore & Potomac R. Co. v. Jones*, 95 U. S. 439.

tom of all brakemen in that yard and in all other yards on that road to ride on the pilot, were questions of fact to be determined by the jury.

It was said: There were two concurring facts found by the jury and fairly embraced in their verdict: (1) That the position was not a dangerous one; (2) that it was the usual place taken by brakemen in that yard when discharging the duties of a switchman. These facts distinguish this case from *Railroad Co. v. Jones*, 95 U. S. 439; *Hough v. Railway Co.*, 100 U. S. 213. In these cases the injured employees were not engaged in performing the duties of throwing switches or coupling cars; they were engaged in other work and voluntarily took positions upon the pilot or cow-catcher. In this case no special provision is made for the employee to ride. He is expected to ride, of course, and in doing so must be governed by the demands of duty. If he is to couple or switch ahead, he must ride near the head of the engine so as not to delay the work; or if he is to switch or couple behind the engine, his position would naturally be on the rear part of the engine. He must act promptly, decide quickly and not delay the work. All these questions distinguish this case from the reported ones. *Railway Co. v. Estes*, 37 Kan. 715, 16 Pac. 131, is also distinguished, for in that case the injury occurred on a regular switch-engine, provided with appliances for riding, and the employee voluntarily selected a cab-step to ride on.¹

1250. Where an employee in charge of a hand-car on a railway track, whose duty it was to return with it before night, stopped by the way and spent the evening in social pleasure at neighboring saloons, and wrongfully delayed his return until it had become too dark to observe freight-cars which had in the meantime been left by the railway company standing on the track, it was held that he voluntarily took the risk of running his car in the darkness under the circumstances.²

¹ *Missouri Pacific R. Co. v. McCally*, 41 Kan. 639, 21 Pac. 574.

² *Sliney v. Duluth & W. R. Co.*, 46 Minn. 384, 49 N. W. 187.

1251. Where a brakeman on a railroad construction train, who in spite of warning by a co-employee attempted to adjust ties loaded upon a moving car which had become disarranged so as to project over the end of the car, and was thrown from the car, it was held that he was guilty of such contributory negligence as would prevent a recovery.¹

4. Precautions, Failure to Take.

1252. It was held that a car-repairer who knew that cars were likely to be shunted in upon a track upon which he was at work repairing a car, who failed to put out the customary flag as a signal, was guilty of such contributory negligence as would prevent recovery from the employer when thus injured.²

1253. It was held that a car-repairer, injured while under a car in the performance of his duties, was not guilty of contributory negligence in not stationing a watchman to warn him of dangers from other cars being thrown against it.³

1253a. Where an experienced car-repairer took his position under the last car of a train, with knowledge that a caboose was to be attached to the car, and failed to put out a flag or give any signal or warning of his position, it was held he was guilty of negligence.⁴

1253b. Where a car-repairer was injured while at work under a car by a switch-engine coming in at the west end of the side-track striking the same, and it appeared that cars occasionally came in at that end, though not as frequently as at the east end, and he placed a flag at the east end but none at the west end, it was held he was guilty of contributory negligence.⁵

1254. Where an employee of a railroad company was injured while walking on a long trestle or bridge on his way

¹ Georgia Pac. R. Co. v. Bradfield (Miss.), 10 So. 577.

⁴ Southern Pac. R. Co. v. Pool, 160 U. S. 438.

² Cypher v. Huntingdon, etc. Co., 149 Pa. St. 359.

⁵ C., B. & Q. R. Co. v. McGraw (Colo.), 45 Pac. 383.

³ Berry v. Central Ry. Co., 40 Iowa, 564.

home from his place of work, by an engine suddenly coming upon him, and it appeared it was customary for the gang of men of which he was a member to be carried across such bridge on a train, and there was no train the night in question, and the men were told by their foreman that no train would come over the bridge within an hour or an hour and a half, and he testified that if he had seen the locomotive coming he could have stepped to one side out of the way, but he did not see it because it was coming around a curve, and he never thought of the locomotive because the boss told him there was nothing to come across, and he was walking at ease without thinking of anything, it was held that the question of his negligence in not keeping a lookout for the train, in view of the assurance of the boss that there was none to come, was for the jury.¹

1255. Where an employee in a saw-mill, engaged in and whose duties for some time had been the operation of what was termed a "peep" saw, used to cut off slabs of unusual length, which was adjusted so as to be below the rollers when not in use, and when required for use was raised by a lever operated by the foot, was injured by his hand coming in contact with the saw, which for some reason did not fall below the level of the rollers, and it appeared that occasionally the saw would not fall below the rollers, which such employee knew, and that at the time of his injury, if he had looked, he would have seen the condition of the saw, it was held that he was guilty of such contributory negligence as would prevent a recovery.²

1256. Knowledge by a track-repairer that the track was defective, and his continuing near such track so that a car jumping the track struck him, was held not contributory negligence as matter of law. It was, however, a circumstance to be considered by the jury.³

¹ Northern Pacific R. Co. v. Amato, 144 U. S. 465.

³ Swadley v. Missouri Pacific R. Co., 118 Mo. 268, 24 S. W. 140.

² Johnson v. Hovey & McCracken, 98 Mich. 343.

1256a. The mere fact that a brakeman was familiar with the conditions surrounding a water-tank is not conclusive upon the question of his contributory negligence, where he was injured by stepping on ice formed by water leaking from the tank, it appearing that ice had not formed there until within a few days prior to the accident, and that his duties had not called him to that part of the yard.¹

1257. Where signals of danger and safety are both continuously displayed together, so as to leave in doubt which signal should be regarded, it is negligence for an engineer to proceed with his engine.²

1258. Where a miner, who was directed to drill out a hole in a blast which was supposed to have blown out, expressed some fear, but went to work and was injured by an explosion, and he could, if he had examined, have readily ascertained whether the cartridge had exploded, it was held that his negligence was such as, notwithstanding the boss may have been negligent, would preclude recovery.³

1259. Where an employee in a coal mine, whose duty it was to examine the roof after making a blast and place props to support it, if necessary, failed to do so, though props were conveniently at hand for that purpose, and was injured by the fall of coal loosened by the blast, the proximate cause of his injury was his negligence and not the failure of the mining company to comply with the provisions of the mining act of 1885, requiring the employment of a mining boss with a proper certificate and the keeping of a stretcher at the mine, and therefore there could be no recovery.⁴

1260. Plaintiff with other employees of defendant was ordered to unload iron from a car onto a platform ten inches from the bed of the car. It was so dark that it could not be seen whether there was a foot-board across the space of

¹ *McFall v. Iowa Cent. R. Co.* (Iowa), 65 N. W. 321.

² *Devine v. Savannah, F. & W. R. Co.*, 89 Ga. 541, 15 S. E. 781.

³ *Sexton et al. v. Turner*, 89 Va. 341, 15 S. E. 862.

⁴ *Christner v. Cumberland & Elk Lick Coal Co.*, 146 Pa. St. 67, 23 Atl. 221.

sixteen inches or not, but plaintiff, supposing there was, without examination stepped into the car, and in retiring with an armful of iron fell through the space and was injured. There was a foot-board near at hand and also a lamp which plaintiff and his co-employees could have used. It was held that plaintiff was guilty of contributory negligence. It was said: While employers should be held to a strict performance of duty towards employees, yet the latter must be required to exercise some prudence and to use the necessary means supplied to them, to enable them to do their work in a safe and expeditious manner.¹

1261. Where a lamp used by a night watchman in making his rounds in a certain building becomes extinguished, it is negligence for him to attempt to pass a place of known danger, such as a hole in the floor, without relighting it or procuring a lantern.²

1261a. An employee who knew that a blow-off pipe from boilers was connected with a manhole used for the purpose of cleaning out a sewer on the defendant's premises was held to be guilty of contributory negligence in going into such manhole to clean out the sewer without first notifying the person in charge of the boiler not to blow off steam while he was in there.³

1261b. It was held negligence as a matter of law for an employee who, for the first time (though he had seen others do it), in going down a box wherein operated the lower wheel of a band-saw, to oil it, to step off the rim of the wheel by which he descended into the conveyor of sawdust at the bottom, which he must have known was slippery and slanting, without paying attention where or how he stepped. He slipped and was injured by contact with the teeth of the saw.⁴

1262. It was held that an employee whose duty it was to operate cars upon an elevated tramway and from time to

¹Piper v. Cambria Iron Co., 78 Md. 249, 27 Atl. 939. ³McLean v. Chemical Paper Co., 165 Mass. 5.

²Ingram v. Lehigh Coal & Nav. Co., 148 Pa. St. 177, 23 Atl. 1001. ⁴Jones v. Sutherland, 91 Wis. 587.

time to inspect said tramway and report any defects therein could not recover damages from his employer for injuries suffered by him while operating cars caused by a defect in the tramway, which he had negligently failed to observe and report, but which he could have observed by a reasonably careful inspection.¹

1263. It was held gross negligence on the part of a section-boss in running his hand-car into a deep cut where he was injured, without having sent any one ahead to watch for and warn a passenger train which he knew was approaching and would soon reach that point on the road.²

1264. It was said not to be negligence as matter of law on the part of a foreman, such as will prevent a recovery for injuries sustained by the neglect of those under him to obey the orders he has given, in failing to see or learn that such orders are obeyed.³

1265. Where a miner traveling along a path used by workmen in going to and returning from their work was injured by stepping into a hole made by an escape of steam from a pipe which was laid beneath such path, such workman having no knowledge of the pipe being there, and the steam escaped by reason of a defect in the apparatus, it was held that such workman was guilty of such contributory negligence as would prevent a recovery, on the ground that he saw the escaping steam and deliberately walked into the hole.⁴

1266. The conductor and engineer of the train upon which the deceased was brakeman was by telegraph ordered to keep out of the way of a certain train following them. It was the usual custom to signal trains approaching from behind at the place where the accident in question occurred by going back on the track and placing caps on the rails. It appeared that the deceased was about to do this, but

¹Cooper, Hewitt & Co. v. Butler, 103 Pa. St. 412.

²Houser v. C., R. I. & P. R. Co., 60 Iowa, 230.

³Goodlet v. Louisville & N. R. Co., 122 U. S. 391.

⁴Payne v. Reese, 100 Pa. St. 301.

waited a few moments to fix his fires, and in that time a collision occurred. It was held that the duty of avoiding a collision rested on the men in charge of the train upon which the deceased was employed, and there could be no recovery; for if deceased ought as brakeman to have put caps on the rails as a signal and failed to do so, the collision was the result of his own negligence; and if the conductor or engineer failed to side-track the train or give proper signals, the collision was the result of the negligence of deceased's co-employees.¹

1267. Where an employee heedlessly, while carrying a box, walked backwards, and came in contact with a revolving gearing which he knew was there, it was held that he was guilty of such contributory negligence as would bar a recovery.²

1268. It was held that an employee in a mine who knew that cages were constantly moving up and down with great rapidity was guilty of contributory negligence in crossing such place and failing to look and listen for the cage.³

1269. Where a workman was injured by the fall of a bank of earth which his superiors had attempted to dislodge and failed, it was said that, being justified in relying upon the inspection of all points of danger by his superior, he would not be negligent in remaining at work if the danger which existed could not be seen by him.⁴

5. Tracks — Crossing, Working and Walking on.

1270. For an employee to walk upon a railroad track where trains are liable to pass is itself dangerous, and to do so without looking to see whether a train is approaching is negligence *per se*.⁵

¹ Hoover v. Beech Creek R. Co.,
154 Pa. St. 362, 26 Atl. 315.

⁴ Deppe v. C., R. I. & P. R. Co.,
38 Iowa, 592.

² Beck v. Firmenich Mfg. Co., 82
Iowa, 286.

⁵ Kenna v. Central Pac. R. Co.,
101 Cal. 26.

³ McDonald v. Iron & Coal Co.,
135 Pa. St. 1.

1271. Where a railroad switchman was run over by a train while he was attending to the switching of a train on another track, and when he had stepped across the latter track to signal his engineer, it was said that he could not be held, as matter of law, guilty of contributory negligence, from his testimony that it was his duty to watch out for the train by which he was struck, and that he could have seen it had he not been occupied with his work, at a distance of one hundred and fifty feet, where the train was running at a speed which would cover that distance in five seconds, and it was also his duty to attend to his work.

It was further held that the fact that he stepped across the track in front of a moving train to reach the cars which he was switching does not, as matter of law, show contributory negligence, where it was at night and his vision was interfered with by shadows of a bridge from the electric lights.

The negligence alleged against the defendant was the running of a train at a rate of speed in excess of that limited by an ordinance.¹

1272. Where a fireman, while walking to the round-house in defendant's yard to take out his engine, was struck by a car that had been kicked from one track to another, and it appeared that he was familiar with the yard, had seen the car on one of the tracks, and walked along some one hundred and eighty feet to the point where he was struck without looking back, his ears being muffled, and there were places in the yard where he might have walked in safety, it was said: If this was not careless, even reckless conduct, we should not know where to find it. It was held that the plaintiff was guilty of contributory negligence as matter of law.²

1273. A section-hand who crossed from the track on which he was working onto another track just in front of cars pushed by a switch-engine, without looking, and with his

¹ *Bluedorn v. Missouri Pac. R. Co.*,
121 Mo. 258, 25 S. W. 943.

² *Wilber v. Wisconsin Central*
Co., 86 Wis. 535, 57 N. W. 356.

shoulder turned towards them, though they were in plain sight, and it having passed him several times shortly before, on the track upon which he was working without signals, was held guilty of contributory negligence.

The rule governing travelers about to cross a track, which requires them to look and listen, was applied.¹

1274. Where an engineer in the employ of the defendant was run over by another engine of the defendant moving on its tracks, and it appeared that while upon his engine he had seen the other engine standing on a side-track at a coal-chute some distance from where his engine was standing, which was on the main track, and a few moments later he left his engine and started across the side-track to the coal-chute and was struck by the other engine, and it further appeared that such engine was running at a speed greater than usual, and that the bell was not rung, it was held that he could not recover. The rule was applied to this employee that has been settled by this court in relation to third persons, namely, that when a person approaches a railroad track, having an opportunity to look and listen, if he fails to do so before venturing into the place of danger, such failure constitutes contributory negligence so as to prevent any recovery on the ground of want of ordinary care on the part of those operating cars on such track. Though the defendant may be guilty of negligence or a violation of law in respect to the speed of its trains and the giving of signals, or in other respects, the duty of such employee to look and listen is not excused.²

1275. Where an experienced railroad man, on a bright day with nothing to obstruct his vision, started across and along a railroad track, with which he was entirely familiar, while cars were slowly approaching some twenty-five or thirty feet away, and he was run upon, it was held that he was guilty, as matter of law, of such contributory negligence as would prevent a recovery; and it was immaterial

¹ *Loring v. Kan. City, Ft. S. & M. R. Co.*, 128 Mo. 349, 31 S. W. 6.

² *McCadden v. Abbot et al.* (Wis.), 66 N. W. 694.

that his apparent intention was to remove a hand-car from another track in front of cars approaching it on that track.¹

1275a. A trackman working upon the track stepped onto a parallel track to avoid an engine, and was struck by an engine moving on the latter track. His view of the second track was unobstructed for some distance, and he could have seen, had he looked, which he failed to do, the approaching engine, which caused him injury. It was held that failing to look was contributory negligence; that the fact that it was not customary on other portions of the road to permit engines thus to move on parallel tracks, and he was ignorant of a custom of doing it at the particular place, would not excuse him.²

1275b. Whether a trackman, working on the track on a windy day at the direction and under charge of a foreman, in failing to keep a lookout for an approaching train was guilty of negligence, was held to be a question for the jury.³

1276. An employee engaged as a repairer of tracks was run over by a switch-engine and cars it was moving while he was at work in one of the railroad company's yards. He stood with his back to the approaching cars and so remained at work without looking backward or watching for the moving engine until he was struck and run over by the front car. The engine was moving slowly—about as fast as a man would walk. The tracks were straight without obstruction, and he could have seen, by ordinary observation, the approaching cars for a quarter of a mile. He knew the switch-engine was busy moving cars and making up trains, and that at any moment cars were likely to be moved along the track upon which he was working. It was held that there was no proof of negligence on the part of the defendant, and if, by any means, negligence could be imputed to it, the plaintiff by his negligent inattention contributed to the

¹ *Elliot v. C., M. & St. P. R. Co.*,
150 U. S. 245.

³ *Comstock v. Union Pacific R.
Co.*, 56 Kan. 228, 42 Pac. 724.

² *Tomko v. Central R. Co.*, 37
N. Y. S. 144, 1 App. Div. 289.

injury. It was said, however, that the measure of duty to such an employee was not such as to a passenger or stranger. That the ringing of bells and the sounding of whistles on trains going and coming, and switch-engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act upon the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach. It cannot be said that, under these circumstances, the defendants were compelled to send a man in front of the cars for the mere purpose of giving notice to employees who had all the time knowledge of what was to be expected.¹

1276a. A night yard-master in a yard was injured while walking on the track by being overtaken by an extra train; a few minutes before he was struck he looked back and saw no train approaching. He knew that no regular train was due for some hours. The extra train was negligently operated. It was held the question of his contributory negligence was for the jury.²

1277. Where an employee who had been working in the defendant's yards for four years, and had twenty-five years' experience in railroad work, while standing idle on one of defendant's tracks was killed by an engine which was backing away from a switch, and which he could have noticed with ordinary caution, since the engine had been moving about the yards for some time and the bell was almost constantly ringing, it was held that he was guilty of such contributory negligence as would prevent a recovery. It was said: It is the duty of persons employed in such places to be reasonably diligent in guarding against accidents, and especially to observe and keep out of the way of moving engines and cars. They have no right to rely wholly upon the persons in charge of them to prevent accidents, but must use due care to avoid danger. These rules are founded

¹ *Aerkfetz v. Humphreys*, 145 U. S. 418. ² *Hayes v. Northern Pacific R. Co.*, 74 Fed. 279.

upon the necessities of the business of operating railways. They are reasonable and are fully sustained by the authorities. (Citing *Collins v. Railway Co.*, 83 Iowa, 346; *Magee v. Railway Co.*, 82 Iowa, 250; *Elliott v. Railway Co.*, 150 U. S. 245; *Aerkfetz v. Railway Co.*, 145 U. S. 418.)¹

1278. Where an employee engaged in working upon a track in defendant's yards was injured by a car being shunted or kicked upon the track where he was at work, which car was unattended, and he knew that such was the custom of making up trains in such yard, it was held that he could not recover, and that a verdict should have been directed for the defendant. It was said: It could not be held that it was negligence as matter of law on the part of the defendant to shunt cars that way in a railroad yard. The employee knew the danger, saw the train being made up and should have kept a lookout.²

1279. Where an employee is fully cognizant of the danger to which he is exposed from the negligent shunting of cars on the tracks where he is from time to time at work, and knows that his safety depends upon the care exercised by his fellow-servants in shunting the cars, and is aware of the precaution taken by the railroad, he cannot recover for an accident caused by the negligence of a fellow-servant.³

1280. An employee at his post on a railroad is not to be held to the same measure of diligence in looking for approaching trains as a traveler who is about to cross the track.⁴

1281. It was held that a flagman at a street crossing intersected by two parallel railway tracks, who, while walking leisurely on one of the tracks, without looking in both directions for approaching engines, was run over from behind by a switch-engine pushing a box-car, could not recover, as

¹ Keefe, Adm'x, v. C. & N. W. R. Co., 92 Iowa, 182, 60 N. W. 503.

³ Campbell v. Pennsylvania R. Co. (Penn.), 2 Atl. 489.

² Schaible v. L. S. & M. S. R. Co., 97 Mich. 318, 56 N. W. 565. See, also, *Murphy v. Railroad Co.*, 11 Daly, 122.

⁴ *Crowley v. Bur., C. R. & N. R. Co.*, 65 Iowa, 658.

such conduct constituted contributory negligence. The rule which required travelers to look before attempting to cross a railway track was invoked, and it was said: By how much stronger reason should it be exacted of a watchman or flagman, whose special office requires him to watch and give warning to others of approaching danger.¹

1282. It was held that the kicking of cars within city limits, but within its yards, at a rate of speed prohibited by ordinance, without any one being stationed near at hand or on them to check the speed or give warning of their approach to men working on a parallel track, was negligence *per se* where a track-repairer was injured, and that whether such track-repairer, in view of his limited experience, was guilty of contributory negligence was a question for the jury. Under the Iowa statute, the question of fellow-servant was not involved.²

1283. See, also, as to the question of the act being negligence, the cases cited in note.³

1284. The mere fact that a car inspector goes on one track in order to inspect cars going on another, such track being an appropriate place from which to inspect cars, does not render him guilty of contributory negligence so as to prevent a recovery in case he is injured through the negligence of an engineer running a switch-engine on the track on which he was standing, though he knew a train was likely to pass along such track. It was said: It has never been the law that an employee of a railroad, who goes upon a track in the performance of his duties and exercises ordinary care, forfeits all claim to a recovery and excuses all negligence on the part of the company, simply because he knew a train was likely to pass down that track at any time.⁴

1284a. Whether a car inspector, standing on a pile of cinders between tracks while a train was passing on an ad-

¹ Louisville & N. R. Co. v. Crawford, 89 Ala. 240, 8 So. 243. 487; Railway Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569; Buelow

² Tobey v. Burlington, C. R. & N. R. Co. (Iowa), 62 N. W. 761. v. Railway Co. (Iowa), 60 N. W. 617.

³ Taylor v. Louisville & N. R. Co., 93 Tenn. 305, 27 S. W. 663.

⁴ Railway Co. v. Dignan, 56 Ill.

jacent track, who was injured by the pile being insecure and causing him to fall, was guilty of contributory negligence, was held to be a question for the jury.¹

1285. Where a train had been cut in two, and a section-man engaged in repairing the track stepped off the track to let the first section pass, and then stepped back on again without looking, and was struck by the rear section, and he knew of the custom to thus cut the train and saw the train approaching, it was held that he could not recover.²

1286. Where a section-man was injured while attempting to cross a track by the rear section of a train which was divided in the act of making a flying-switch, and it appeared the portion of the train which caused him injury was for some distance in plain view and not more than twenty-five or thirty feet from him, and he crossed the track with his back partly turned, it was held that he was guilty of contributory negligence as matter of law. It was said: The conclusion from the evidence is irresistible that he did not look or listen before the attempt to cross the track; or if he did, that he voluntarily and with full knowledge of the danger he was incurring unnecessarily placed himself in a position of peril and immediate danger. In either event his negligent conduct in this regard, failing to know of the hazard he was taking upon himself, when to have actual knowledge of it he had only to look or listen, or, knowing of the danger, deliberately and of his own volition, unnecessarily assuming such risk, was negligence which, under the circumstances, must inevitably have contributed to the injury complained of.³

1287. It was held not negligence as matter of law for section-men upon a hand-car to run the car in advance of an approaching train, after seeing the train. It was said: For one not employed in railway service to risk his life by attempting to run a hand-car in advance of a train known to

¹ *Beaver v. Atchison, T. & S. F. Co.*, 56 Kan. 514, 43 Pac. 1136.

³ *Elliot v. C., M. & St. P. R. Co.*, 5 Dak. 523, 41 N. W. 758.

² *Haden v. Railroad Co. (Iowa)*, 48 N. W. 733.

be approaching would of course be negligence. But such a conclusion is not a matter of course in the case of railroad section-men, whose duty requires them to thus be upon and pass over the railway, although there may be obvious danger in so doing.¹

1288. Where a section-hand, together with his fellows, knowing of the approach of a train, got off the track while some distance away to let it pass, and the section foreman ordered him to take some dirt from one of the rails, which he proceeded to do with his back to the approaching train, and while thus employed he was notified to get off the track, but before he did so was struck by the engine and severely injured, it was said: He knew the train was approaching, and it was his own negligence in failing to get off the track.²

1289. Where a track-walker while engaged in repairing a broken or misplaced rail was killed by a rapidly-moving train, and it appeared he was hurrying in his work to make the track safe for the passage of such train, which he knew was about due, and such repair was necessary to save the train from being wrecked, and he saw the train when near at hand and waved his hat as a signal for it to stop, but continued his work too long, it was held that a judgment of nonsuit was proper.³

H. *Statute Requirements—Effect of on Contributory Negligence.*

1290. Generally.—Where a statute provided that every railroad company shall be liable for damages sustained by any employee without contributing negligence on his part, when such damages are caused by the negligence of other employees therein specified, it was held that the statute did not change the rule as to the burden of proving contributory negligence.⁴

¹ Slette v. Great Northern R. Co., 53 Minn. 341, 55 N. W. 137.

² Harrison v. Texas & Pacific R. Co. (Tex. App.), 31 S. W. 242.

³ Rawlston v. East Tenn., V. & G. R. Co., 94 Ga. 536, 20 S. E. 123.

⁴ Dugan v. C., St. P., M. & O. R. Co., 85 Wis. 609.

1290a. The amendment to the constitution of the state of Mississippi, being section 193 of the constitution of 1890, which provides that knowledge by an employee of defects in machinery shall not bar a recovery by him for injuries caused by such defects, does not preclude the defendant from having the fact of such knowledge on the part of the employee considered on its bearing upon the issue of the plaintiff's contributory negligence.¹

1290b. Contributory negligence in an action by a boy may be pleaded and proved, though a statute prohibits the employment of boys in mines, where such action is brought for injuries sustained while working in a mine.²

1. Blocking Frogs.

1291. Leaving a frog in its track unguarded is not such negligence on the part of a railroad company as will, at common law, render it absolutely liable for injuries resulting therefrom, regardless of the contributory negligence of the person injured. Chapter 183, Laws of 1889, requiring that frogs shall be blocked, and providing that a railroad company shall be liable for all damages on account of injuries which may be sustained by reason of the neglect of the company to provide such blocking, does not take away the defense of contributory negligence.³

1292. It was held that Public Acts of Michigan of 1883, page 191, which requires that frogs and switches shall be blocked, does not relieve an employee from the consequences of contributory negligence nor from the doctrine of assumed risk.⁴

¹ *Buckner v. Richmond & D. R. Co.*, 72 Miss. 873, 18 So. 449.

² *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32 S. W. 460.

³ *Holum v. C., M. & St. P. R. Co.*, 80 Wis. 299.

⁴ *Grand v. Mich. Cent. R. Co.*, 83 Mich. 564, 47 N. W. 837; *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645. See, also, *Lake Erie & W. R. Co. v. Craig*, 73 Fed. 642.

2. Boxing or Covering of Gearing

1293. Statute requiring boxing of tumbling-rods of threshing machines.—Where a statute required tumbling-rods of threshing machines to be boxed, and provided that the persons owning or operating such machines shall be liable in damages to any person injured by reason of neglect so to do, it was held that the statute was not intended to change the general rule applicable to such cases; that a plaintiff cannot recover for injuries resulting from the alleged negligence of the defendant if his own negligence in any way contributed to the injury.¹

1294. Statute requiring boxing of machinery.—Chapter 459, Laws of 1887 of Wisconsin, provides that all belting, shafting, gearing, hoists, fly-wheels, elevators and drums of manufacturing establishments so located as to be dangerous to employees when engaged in their ordinary duties shall be securely guarded or fenced “so as to be safe to persons employed in any such place of employment.” It further provides for a penalty of \$75 for violation of these provisions. An employee was injured by contact with exposed gearing in a mill, and it was assumed that the doctrine of contributory negligence and assumed risk applied.²

1295. Chapter 462, Laws of 1887 of New York, provides that all gearing and belting shall be provided with proper safeguards in a factory in which women and children are employed, with a penalty for neglect or refusal. It was held that an infant employee could not recover when he was injured by getting his hand in exposed gearing while pulling out a lever in the side of the machine, not in motion, in order to start it, at the request of a fellow-workman, the duty being outside of the scope of his employment, where he knew of the absence of guards.³

¹ Reynolds v. Hindman et al., 32 Iowa, 146.

³ White v. Wittemann Lith. Co., 131 N. Y. 631.

² Nadau v. White River Lumber Co., 76 Wis. 120.

1296. Section 1636, Sanborn & Berryman's Annotated Statutes of Wisconsin, provides that "all gearing, etc., so located as to be dangerous to employees engaged in their ordinary duties shall be securely guarded and fenced so as to be safe to persons employed in any such place of employment." It was held that under that statute an employer is not absolutely liable for any injury resulting from failure to cover such gearing, but he may make the defense of contributory negligence.¹

3. Cattle-guards and Crossings, Construction of.

1297. Section 1288 of the Iowa Code, after stating the duty on the part of railroad companies in respect to the construction of safe crossings and cattle-guards, provides, "and any railway company neglecting and refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such neglect and refusal, and in order for the injured party to recover it shall only be necessary for him to prove such neglect or refusal." It was held that the defense of contributory negligence was not barred.

It was said: Under this section a recovery may be had by proving the neglect or refusal, and that the party was injured as a result thereof. When this is done a *prima facie* case is made, which, in the absence of testimony by the defendant, the statute provides shall be sufficient to warrant a recovery. The defendant, however, may establish any defense it may have, including the contributory negligence of the plaintiff's intestate.

Whatever may have been said or intimated as holding a contrary view in *Payne v. Railway Co.*, 44 Iowa, 236; *McKilvery v. Railway Co.*, 84 Iowa, 458; *Moriarty v. Railway Co.*, 64 Iowa, 700; *Lang v. Railway Co.*, 49 Iowa, 469, is disapproved.

The court also distinguishes cases arising under section 1289, relating to fencing of railroads, where the provision is

¹ *Thompson v. The Edward P. Allis Co.*, 89 Wis. 523.

that a railroad company "shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damages caused, unless the same was occasioned by the wilful act of the owner or his agent, and in order to recover it shall only be necessary for the owner to prove the injury or destruction of his property," on the ground that under section 1289 the company's liability is made absolute, unless the injury was the result of the wilful act of the owner or his agent.¹

4. Elevator Holes, etc., Protection Against.

1298. A statute of Massachusetts relating to elevators provides that the openings of all hoistways, hatchways, elevators and well-holes upon every floor of a factory shall be protected in a manner specified, and that any owner of a factory shall be liable for all damages suffered by any employee by reason of the violation of any provision. In an action brought under this act it was held that an employee cannot maintain an action against his employer for an injury caused by such violation, unless at the time he was injured he was in the exercise of due care. The law of Massachusetts is held to be that, where a statute does not otherwise provide, the rule requiring the plaintiff in an action for negligence to show that at the time of the injury complained of he was in the exercise of due care is the same whether the action is brought under a statute or at common law.²

5. Fencing Shafts of Mines.

1299. Revised Statutes of Illinois, chapter 93, section 14, provides that injury or loss of life occasioned by a wilful violation of the requirement as to fencing coal-mine shafts shall be actionable. It was held that contributory negligence was not a defense.

¹Ford v. C., R. I. & P. R. Co. (Iowa), 59 N. W. 5.

²Taylor v. Manufacturing Co., 143 Mass. 470.

An instruction defining the term "wilful violation" to be a violation of its provisions knowingly and deliberately committed was held correct.

It was further held that it was not error to refuse an instruction that if the jury believed from the testimony that the defendant in good faith, for the protection of the entrance, boarded and fenced it and arranged the car and operation of it to act as a gate or covering for the shaft, and that such protection was sufficient to protect a person in the exercise of the care that a person of ordinary care should, under the circumstances, exercise, from falling into the shaft, then the act of the defendant was not wilful and the verdict should be for them.

It was said: The very object of the statute was to prevent injuries to persons employed in coal mines so that negligence on their part in the manner of doing their work should not prove fatal.¹

1300. Under sections 298-1301, Revised Statutes of Ohio, which require the operator of a coal mine to keep the same free from gas and to have the working places examined every morning with a safety-lamp before workmen are allowed to enter, and give a cause of action to a person injured for direct damage occasioned by any violation or wilful failure to comply with the requirements of the statute, an employee cannot maintain an action against his employer for an injury following such violation, unless at the time he was injured he was in the exercise of due care.

It was said by the court, quoting the language used in *Spiva v. Mining Co.*, 88 Mo. 68, where a statute somewhat similar was under consideration: "The duties imposed by the statute were for the health and safety of those engaged in mining labor and occupation, and entitled to its benefits, but it is not the intention of the act or policy of the law to exempt any from the direct and immediate consequence of his own carelessness. One who voluntarily assumes a risk

¹ Catlett et al. v. Young, 143 Ill. Co. v. Roach, 68 Ill. 174; Litchfield 74, 32 N. E. 447. See, also, Mining Coal Co. v. Taylor, 81 Ill. 590.

thereby waives the provisions of a statute made for his protection."

It was held that proof of failure to obey the statute is all that is necessary to establish negligence; but the statute does not change the well-established rule, that where one has been guilty of negligence which may result in injury to others, still the others are bound to exercise ordinary care to avoid injury.¹

6. Fencing Tracks.

1301. It was held that the New York statute was designed for the protection of employees and passengers upon trains; that the duty to fence tracks was unqualified, and for a violation thereof, causing injury, a railroad company incurs responsibility. The court had uniformly held that the defense of contributory negligence was barred where injury to stock was involved. But in the present case the opinion concludes as follows: "We are therefore of the opinion that the railroad company was responsible to the plaintiff for the injuries received without any fault on his part."²

1302. The general railroad act of 1872 of Wisconsin required railroads to be fenced, and declared the liability of the companies for injury to domestic animals occasioned by failure to fence. When such fences are made and maintained, these sections declare that the companies shall be liable only for wilful or otherwise negligent injury.

Chapter 248, Laws of 1875, requires railroads two years or more in operation to be fenced through inclosed lands, and, upon failure of the company, authorizes occupants thereof to give notice to the companies to fence, and upon continued failure gives an action to occupants against the companies for a penalty for every train passing through their inclosed lands.

It was held that these provisions did not exclude the de-

¹ *Krause et al. v. Morgan*, 52 Ohio St. 662, 40 N. E. 886.

² *Donnegan v. Erhardt*, 119 N. Y. 468.

fense of contributory negligence, overruling former decisions where it had been held the duty was absolute.¹

1303. The Missouri statute, section 2611, requires railroad companies to maintain fences along their tracks, and concludes in language somewhat similar to the New York statute, as follows: "And until fences, openings, gates and fence crossings and cattle-guards as aforesaid shall be made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from or coming upon said lands, fields or inclosures, occasioned in either case by the failure to construct or maintain such fences or cattle-guards. After such fences, farm-crossings and cattle-guards shall be duly made and maintained, said corporation shall not be liable for any such damage unless negligently or wilfully done."

A brakeman was injured as a result of a collision with a steer which had strayed upon the track of the defendant railroad through a defective fence. It was claimed on the part of the defendant, in addition to a denial that the steer came onto the track through a defective fence, that the statute did not avail employees, and that the plaintiff was guilty of contributory negligence in not being in his proper place on top of the caboose.

It was said, in reference to a request to charge upon the question of the plaintiff's contributory negligence, that it was obvious that if there was in the charge no reference to the matter of contributory negligence, and the case stood alone upon the refusal to give this instruction, the ruling (refusing the request) could not be maintained. But the court did refer to the matter, and the question is whether he did so fully and accurately, etc.²

1304. A statute of Minnesota provided that "any company or corporation operating a line of railroad in this state,

¹ *Curry v. C. & N. W. R. Co.*, 43 Wis. 665.

² *Atchison, T. & S. F. R. Co. v. Reesman*, 60 Fed. 370 (C. C. A.).

and which company or corporation has failed or neglected to fence said road and to erect crossings and cattle-guards, and maintain such fences, crossings and cattle-guards, shall hereafter be liable to all damages sustained by any person in consequence of such failure or neglect." It was held that such statute did not have the effect to bar the defense of contributory negligence or assumed risk.¹

1305. It was said in reference to statutes requiring fences as a protection for animals and giving an action to the owner for the loss caused by the breach of that duty, "and although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence."

It was further said: The question of contributory negligence does not appear to us to arise upon this record. It is not contended by the counsel for the defendant in error that if there was evidence tending to prove negligence on its part the case could properly have been withdrawn from the jury on the ground that it appeared as matter of law that the plaintiff was not entitled to recover by reason of his own contributory negligence.²

1306. Section 1810 of the Revised Statutes of Wisconsin requires the construction of fences by railroad companies, and provides that "until such fences and cattle-guards shall be duly made, every railroad corporation owning or operating any such roads shall be liable for all damages done to cattle, horses or domestic animals or persons thereon occasioned in any manner, in whole or in part, by the want of such fences or cattle-guards; but after such fences and cattle-guards shall have been in good faith constructed, such liabilities shall not extend to damages occasioned in part by contributory negligence, nor to defects existing without neg-

¹ Fleming, *Adm'r, v. St. Paul & D. R. Co.*, 27 Minn. 111; *Johnson v. C., M. & St. P. R. Co.*, 29 Minn. 425. ² *Hayes v. Mich. Cent. R. Co.*, 111 U. S. 228.

ligence on the part of the corporation or its agents. It was held that the protection afforded extended to employees, and that the liability for failure to erect fences was absolute and barred the defense of contributory negligence. The case of *Curry v. Railway Co.*, 43 Wis. 665, distinguished.¹

1307. Section 1289 of the Iowa Code, requiring the fencing of railroad tracks, concludes: (The railway company) "shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damages caused, unless the same was occasioned by the wilful act of the owner or his agent; and in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property." It was held that the terms of this statute made a railroad company liable absolutely, unless the injury was a result of the wilful act of the owner or agent.²

7. Fires — Prescribing Liability for.

1308. The Iowa statute, section 1289, in addition to requiring railroad companies to fence their tracks, also contains a provision as follows: "Any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating any such railways, and such damage may be recovered by the party damaged in the same manner as set forth in this section in regard to stock." The provision in regard to stock is that the company shall be liable to the owner of such stock for the value of the property injured or killed by reason of the want of such fence, unless the same was occasioned by the wilful act of the owner or his agent. It was held that where property was destroyed by fire this statute barred the defense of contributory negligence.³

¹ *Quackenbush v. Wis. & Minn. R. Co.*, 62 Wis. 411. 459; *Corwin v. N. Y. & Erie R. Co.*, 18 N. Y. 42; *Shepherd v. B. & E. R. Co.*, 35 N. Y. 641.

² *Spence v. Railway Co.*, 25 Iowa, 139; *Inman v. Railway Co.*, 60 Iowa, 139.

³ *West v. C. & N. W. R. Co.*, 77 Iowa, 654.

8. Sign-boards — Erection of.

1309. Statute requiring the erection of sign-boards at crossings.— Section 1331, revision of 1860, of the Iowa statute, after stating the duty required, provides: "And every company neglecting or refusing to erect such sign shall be liable in damages for all injuries occurring to persons or property from such neglect or refusal."

It was said: This statute imposes a duty upon the defendant, a failure to discharge which is negligence. Proof of such failure establishes one of the conditions essential to the plaintiff's right of recovery, but it does not relieve him from the necessity of establishing the other condition, to wit, that his own negligence did not contribute to the injury. It is just as incumbent upon the plaintiff to show reasonable care on his part, when the negligence of the defendant consists in the failure to observe a statute, as when it arises from any other omission or neglect.¹

9. Sounding of Whistle and Ringing of Bell.

1310. Statute requiring the sounding of a whistle and ringing of a bell upon locomotives.— After stating the duty required, the statute (sec. 1, ch. 104, act 20, Gen. Assem.) provides: "And the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect."

It was said that there was a marked difference in the legal effect of this provision and that in section 1289 of the code (statute relating to fencing railroads). The statute relating to the giving of signals imposes a duty upon the corporation, the omission of which is negligence, but before the person injured can recover he must show that his negligence did not contribute to the injuries.²

¹ Dodge v. Burlington, C. R. & M. Ry. Co., 41 N. Y. 296; Harty, Adm'r, R. R. Co., 34 Iowa, 276; Wilcox v. v. Central Ry. Co. of N. J., 42 N. Y. Watertown & O. R. Co., 39 N. Y. 468.

358; Ernst v. Hudson River R. Co., ² Sala v. Railroad Co., 85 Iowa, 39 N. Y. 61; Havens et al. v. Erie 678, 52 N. W. 664.

10. Speed of Trains.

1311. Where it was customary to run a switch-engine in a railroad yard faster than the lawful rate (six miles an hour), and that an employee well knew it who was injured in attempting to cross the track in front of it, it was held that the question of his contributory negligence was proper for the jury.¹

11. Sunday — Labor on.

1312. Where an engineer of a locomotive engine was performing the ordinary duties of his employment on Sunday, it was held, as he was laboring in violation of the statute (ch. 98, sec. 2), his illegal act necessarily contributed to an injury which he received, caused by a defect in a railroad track, which precluded a recovery.²

I. *Alabama Rule.*

1313. Wilful and wanton negligence.—A plea of contributory negligence is no answer to a complaint counting upon wilful and wanton negligence.³

1314. A failure to do an act which if done might or would have avoided the injury does not necessarily constitute it an intentional or such a wilful or wanton wrong as to be equivalent to intentional wrong. Such a rule would require infallibility in the selection of the means used to prevent the injury. No employer owes such a duty to his employee. Due care and reasonable diligence is all that is required.⁴

¹ Abbot et al. v. McCadden, 81 Wis. 563.

² Read v. Boston & Albany R. Co., 140 Mass. 199.

The statute has been repealed so far as railroad employees are concerned. The doctrine of this case does not generally prevail.

³ Louisville & N. R. Co. v. Markee,

103 Ala. 160, 15 So. 511; Railroad Co. v. Frazier, 93 Ala. 45, 9 So. 303; Railroad Co. v. Watson, 90 Ala. 68, 8 So. 249; Railroad Co. v. Stewart, 91 Ala. 421, 8 So. 708; Crocker's Case, 95 Ala. 412, 11 So. 262.

⁴ Richmond & D. R. Co. v. Bivins, 103 Ala. 142, 15 So. 515.

1315. To a recovery notwithstanding the contributory negligence of a plaintiff, it is essential that it appear that the offending servant, in committing the act, acted recklessly or wantonly in such a manner as that the law imputes to him a willingness to inflict the injury, or an intention to do so. Knowledge of the probable consequences of the wrongful act is essential to the imputation of wilfulness in respect to it. There must be a consciousness on the part of the person charged with misconduct resulting in injury that his conduct will necessarily or probably produce the harmful result complained of, before the law will impute to him a willingness to inflict the injury.¹

1316. Where it was urged that failing to keep a proper lookout by an engineer was wilful neglect (the injury occurring to a traveler at a crossing), it was said in reference to a charge by the court: "The fault in the court's definition in this regard lies, in our opinion, in the assumption that recklessness or wantonness implying wilful and intentional wrong-doing may be predicated by a mere omission of duty under circumstances which do not themselves impute to the person so failing to discharge the duty a sense of the probable consequences of the omission. The charges given by the court in this connection, and its rulings on charges requested by the defendant, proceed on the theory that a mere failure on the part of the defendant's employees to see plaintiff's wagon and team as soon as they might have seen them by the exercise of due care was such recklessness or wantonness as implies a willingness or a purpose on their part to inflict the injury complained of. We do not think that this proposition can be maintained either logically or upon the authorities. The failure to keep a lookout which it was the duty of defendant's employees to maintain, and which would sooner have disclosed the peril of the driver and plaintiff's wagon and team, even conceding that such would have been the case, was at the most mere negligence, inattention, inadvertence; and it cannot be seen in the nature of things

¹ *Anniston Pipe Works v. Dickey*, 93 Ala. 418, 9 So. 720.

how a purpose to accomplish a given result can be imputed to mental conditions, the very essence of which is the absence of all thought on the subject. To say that one intends a result which springs solely from his mind, not addressing itself to the factors which conduce to it, to imply a purpose to do a thing from inadvertence in respect to it, are contradiction in terms. Wilful and intentional wrong, a willingness to inflict injury, cannot be imputed to one who is without consciousness from whatever cause that his conduct will inevitably or probably lead to wrong and injury.

“The theory of contributory negligence as a defense is that, conjointly with negligence on the part of the defendant, it conduces to the damnifying result and defeats any action the *gravamen* of which is such negligence. If defendant’s conduct is not merely negligent, but worse, there is nothing for plaintiff’s want of care to contribute to, there is no lack of mere prudence and diligence of like kind on the part of the defendant, and conjunctively to constitute the efficient cause. Mere negligence, on the one hand, cannot be said to aid wilfulness on the other, and hence such negligence of a plaintiff is no defense against the consequences of the wilfulness of the defendant. But nothing short of the elements of actual knowledge of the situation on the part of the defendant’s employees and their omission of preventative effort after that knowledge is brought home to them, where there is reasonable prospect that such effort will prevail, will suffice to avoid the defense of contributory negligence on the part of or imputable to the plaintiff.”¹

1317. The doctrine stated in the foregoing paragraph was approved, yet it was said in reference to a defective track: Consciousness of the existence of such defective condition of the track, and that the derailment of the car might or would be the probable consequences thereof, is an essential constituent of the degree of negligence, evincing a reckless indifference to the consequences, or a wanton or wilful infliction of the injury. That there was evidence from

¹ Georgia Pacific R. Co. v. Lee, 92 Ala. 262, 9 So. 230.

which, if believed, knowledge of the defective condition of the cross-ties might be inferred.

It was further said that what was said did not harmonize with the expression in the opinion in *Railroad Co. v. Hill*, 90 Ala. 71, 8 So. 90, to the effect that "we are satisfied that it (the evidence) tending to show a condition of the track, not to know and remedy which was such gross negligence on the part of the company as implied recklessness and wantonness, such indifference to the probable consequences of its continued use, such disregard of the safety of passengers being transported over it, as is the equivalent of intentional wrong or a willingness to inflict the injury complained of." The inaccuracy of the expression quoted consists in making the omission to discover and remedy the bad condition of the track—simple negligence—the equivalent of consciousness of the probable consequences, instead of saying that such consciousness might be inferred from the evidence.¹

1318. It was said in reference to the Alabama Code, section 2590, that when an employee sustains injury in the cases and under the conditions specified in the statute, it operates to take from the employer the defense that the employee implicitly contracts to assume the known and ordinary risks incident to his employment. To this extent, and to this extent only, is the common-law rule abrogated. Contributory negligence cannot be imputed to an employee from continuing in the service after merely discovering a defect or negligence, though it may increase the risk of injury. Something more is requisite concerning failure to give information thereof within a reasonable time after knowledge of the defect or negligence, unless the employee knows that the employer or superior is already aware of it.

This rule is necessarily qualified by the nature of the right of action given to the employee "as if he were a stranger," and by the reservation to the employer of the defense of contributory negligence. An employee is bound to use ordinary care for his own protection, and, except as otherwise

¹ *Richmond & D. R. Co. v. Vance*, 93 Ala. 144, 9 So. 574.

provided by the statute, cannot recover when one of the public, rightfully on the track, could not recover under like circumstances. While mere knowledge of a defect and its danger is not of itself contributory negligence, the fact and the use made of that knowledge are circumstances to be considered on the question of negligence. Where injury is imminent, where the appearance of injury is of a degree greater than that which produces the impression that injury may result, where it leaves no room for reasonable doubt, continuing in the service after knowledge of the defect causing the injury, and its nature and extent, must be regarded as contributory negligence. The general rule applicable in analogous cases is as definite as any we can lay down, consistent with the nature of the right of action of the employee and the defense allowed to the employer. By this rule an employee does not exercise ordinary care in not quitting the service when injury is so imminent and impending that a prudent man would not continue therein under like circumstances.¹

J. Florida Rule.

1319. The act of June 7, 1877, section 3744, was adopted from the code of the state of Georgia. The construction placed upon the act by the Georgia court became an integral part of the law. Hence it was held that to entitle an employee to recover by reason of the negligence of a co-employee, he must himself be entirely free from fault or negligence.²

K. Georgia Rule.

1320. In case of an injury to an employee of a railroad company, the employee must be free from fault or he cannot recover.³

¹ Highland Ave. & B. R. Co. v. Walters, 91 Ala. 435, 8 So. 357. See, also, Railway Co. v. Bridges, 86 Ala. 448, 5 So. 864; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 So. 360. ² Duval v. Hunt, 34 Fla. 85, 15 So. 876. ³ East Tenn., V. & G. R. Co. v. Maloy, 77 Ga. 237, 2 S. E. 941.

1321. The rule in this state, so far as applied to railroad employees, is statutory (sec. 3036 of the Code of 1882), which provides "if the person injured is himself an employee of the company and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company should be no bar to the recovery."

The construction given by the courts is that it is not a question of the want of ordinary care, but if there is any fault or neglect, though less in extent or degree, it precludes a recovery.

The cases are collected and will be found under head of FELLOW-SERVANT, GEORGIA.

L. *Kentucky Rule.*

1322. Gross negligence, definition of.—In the management of a railroad or any department thereof, gross neglect is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger.¹

1323. Wilful neglect, definition of.—Wilful neglect is an intentional failure to perform a manifest duty in which the public has an interest or which is important to the person injured in either preventing or avoiding the injury.²

1324. Contributory negligence, definition of.—It is the want of ordinary care on the part of the injured servant in protecting himself from danger.³

1325. The right to plead contributory negligence is denied only in cases arising under the statute authorizing the recovery of punitive damages, where the life of one person has been lost by the wilful neglect of another.⁴

¹ Louisville, etc. R. Co. v. McCoy, 81 Ky. 403. Co., 9 Bush, 81; Kentucky Central R. Co. v. Thomas, 79 Ky. 160.

² Kentucky Central R. Co. v. Gastineau's Adm'r, 83 Ky. 119.

⁴ Owen v. Louisville & N. R. R. Co., 87 Ky. 626.

³ Sullivan v. Louisville Bridge

1326. The doctrine of wilful neglect was applied where the servants of a railroad company were not at their post of duty, by reason of which circumstance an injury which otherwise would have been avoided was occasioned another employee.¹

1327. It was said, where a laborer on a construction train was injured by the cars leaving the track, that although the servant may have acted negligently in riding on some one of the cars, instead of another less dangerous, yet if the disaster which proved fatal to him resulted from a wilful neglect of duty on the part of the other agents of the company who controlled the operation of the train, and it might have been prevented or avoided by them by the use of ordinary prudence and care in the discharge of their duty, the defendant was not exonerated from responsibility.

This action was brought to recover punitive damages for wilful neglect under the statute (2 Rev. Stat. 210).²

1328. Where a switchman went between cars moving backwards to uncouple them, under the orders of the switch foreman, and while there his foot slipped and he was dragged some distance, and such foreman gave the danger signal to the engineer, who from his position could only receive it through the fireman, and there was evidence that the switchman was killed by a forward movement of the train after the danger signal had been given, and his life could have been saved if the train had continued to back or had stopped, it was held that the jury was justified in finding wilful neglect on the part of the engineer after the signal was given. Contributory neglect is not a defense where wilful neglect is established.³

1329. Where the conductor knew that the car was improperly loaded, so as to be dangerous to couple, and intended to notify a brakeman who was injured in making the coupling, but did not inform him because he did not see him, it was held that he was guilty of wilful neglect.⁴

¹ *Newport News, etc. R. Co. v. Dentzel's Adm'r*, 91 Ky. 42.

³ *Louisville & N. R. Co. v. Hurst, Adm'r* (Ky.), 20 S. W. 817.

² *Louisville, C. & L. R. Co. v. Mahony's Adm'r*, 7 Bush, 235.

⁴ *Louisville & N. R. Co. v. Robinson* (Ky.), 16 S. W. 707.

1330. A conductor who permitted a brakeman to be absent from his post of duty on the train at a particular time, and in the caboose, and the conductor was also there, and the train parted while they were there and ran some distance, the engineer giving constant signals and warnings, which were not heard by the conductor or brakeman, and as a result the two sections came together, killing the head brakeman, who was on the engine, it was held that the conductor was guilty of wilful neglect, chargeable to the company. It was an intentional failure to perform a known and manifest duty important to the safety of deceased.¹

1331. Wilful neglect, as used in the Kentucky statute, is intentional neglect or such recklessness as evidenced a purpose to injure; and where a recovery is sought under the statute for wilful neglect causing death, contributory negligence constitutes no defense. But not so where the recovery is sought, not under the statute, but under the rule of the common law; for then, however high the degree of neglect, the plea of contributory negligence is good, and, with evidence to support it, the facts constituting the defense must go to the jury.

Wilful neglect is a higher degree of neglect than gross neglect and was unknown to the common law. It is a creature of the statute, and while it was never used as synonymous with gross neglect, in opinions discussing the facts of a particular case, the doctrine is well settled that this statutory neglect is the only degree of neglect to which the plea of contributory negligence may not be relied on as a defense, and it will not be contended that an instruction to a jury to disregard the plea of contributory neglect would be good when gross neglect is charged and there is proof conducing to sustain the plea.²

¹Newport News & M. V. R. Co. v. Dentzel, Adm'r, 91 Ky. 42, 14 S. W. 958. In Same Case, 14 S. W. 543, gross and wilful neglect were said to warrant a recovery and were used

²Louisville & N. R. Co. v. Coniff's Adm'r (Ky.), 27 S. W. 865. as synonymous.

1332. Common law.—It is not every act of contributory negligence which prevents one from maintaining an action for an injury received. Such negligence will not prevent the plaintiff from recovering, unless for this negligence the injury would not have occurred, or if the defendant, by the exercise of ordinary care, could have avoided the consequence of the plaintiff's negligence.¹

1333. If the employee or agent of a railroad company complaining of injury, contributed to it by his own negligence, he cannot recover damages, unless its co-operating agent charged with gross neglect could have avoided the impending damage by the exercise of ordinary diligence, notwithstanding the neglect of the complaining party.

This doctrine was applied where a brakeman upon a freight train was injured while walking upon the tracks of the company in one of its yards by being run down by a passenger engine. It was held that the questions that ought to have been presented were, whether the plaintiff was negligent in walking upon the track, and whether, after the engine moved, ordinary diligence and care by the engineer could have prevented the collision. It appeared that the engineer did not see him.²

1334. The rule was also applied where a laborer was injured by reason of an engine starting, which was blocked, while he was at work under it. The engineer was charged with gross negligence in not taking proper precautions.³

1335. Gross negligence of a fellow-workman resulting in injury to another employee of the same grade or rank and engaged in the same field of labor does not render the master liable to the injured employee.⁴

¹ *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81; *Kentucky Central R. Co. v. Thomas*, 79 Ky. 160. ³ *Louisville & Nashville R. Co. v. Collins*, 2 Duvall, 114.

² *Louisville, etc. R. Co. v. Robinson*, 4 Bush, 407. ⁴ *Volz v. Chesapeake & O. R. Co.*, 95 Ky. 188, 24 S. W. 119.

M. Tennessee Rule.

1336. The plaintiff's negligence or wilful conduct may be considered in mitigation of damages whether the defendant's conduct had been merely negligent or reckless and wanton.¹

N. Illinois Rule.

1337. **Comparative negligence.**—In Bailey's Master's Liability, page 402 *et seq.*, will be found a full discussion of what has been termed the doctrine of comparative negligence as applied in the state of Illinois.

The author, upon a review of the decisions of the supreme court of that state, was led to the conclusion which he expressed, that the rule of comparative negligence existed there only in name, and not in fact. That the person injured, in a suit for damages, must always show, or it must otherwise appear, to entitle him to recover, that he was in the exercise of ordinary care, or that his want of such a degree of care did not proximately contribute to the injury, and that any want of ordinary care on the part of the defendant which caused the injury would constitute actionable negligence, and that such was the almost universal rule in all the states. That slight negligence on the part of a plaintiff, not amounting to a want of ordinary care, would not preclude a recovery, and that to render the defendant liable his negligence need not be gross beyond the failure to exercise ordinary care.

That work was published in May, 1894. In *City of Lanark v. Dougherty* (Ill.), 38 N. E. 892, in the opinion filed October 29, 1894, it was stated by the court: "The doctrine of comparative negligence is no longer the law of this court." It is sufficient that the instructions require the jury to find that the plaintiff was exercising ordinary care, and that the defendant was guilty of such negligence as produced his injury, without calling the attention of the jury to any nice distinctions between different degrees of care or negligence.

¹ Railroad Co. v. Fleming, 14 Lea, 137.

In view of this declaration of the court, it can serve no useful purpose to collect those cases where such distinctions have been recognized in the language used, and therefore will be omitted in this work, in so far as they do not bear upon the question of ordinary care.

1338. It is held in this state that negligence is a question of fact and not one of law. An instruction which tells the jury, as a matter of law, that certain facts constitute negligence is erroneous. It is for the jury to determine from the evidence whether one or both of the parties may have been negligent in their conduct, and not for the court to take the question from them and declare, if certain facts exist, negligence is established.¹

1339. The rule was, however, stated with some qualification. "The court can never be called upon to say to the jury that negligence has been established as matter of law unless the conduct of the injured party has been so clearly, palpably negligent that all reasonable minds would so pronounce it without hesitation, unless the negligence of the plaintiff is proven by such conclusive evidence that there can be no difference of opinion as to its existence upon the mere statement of facts. The jury must pass upon it."²

1340. A jury were instructed that if at the time the deceased, a section-hand engaged in repairing the track, stepped between the rails he could have seen by simply looking that the train was parted and that the rear of the train was approaching the place where he entered the track, then he was guilty of such negligence and want of care as would prevent a recovery.

The facts were that a section-hand, observing a freight

¹ *Myers, Adm'x, v. Ind. & St. L. Railroad Co. v. Voelker*, 129 Ill. 540; *R. Co.*, 113 Ill. 386; *Great Western Railroad Co. v. Lane*, 130 Ill. 116; *R. Co. v. Haworth et al.*, 39 Ill. 353; *Lake Shore & M. S. R. Co. v. Ouska*, Chicago & Alton R. Co. v. Pennell, 151 Ill. 237, 37 N. E. 897. 94 Ill. 448; *Pennsylvania R. Co. v. Conlon*, 101 Ill. 93; *Pennsylvania R. Co. v. Frana*, 112 Ill. 398; *Railroad Co. v. O'Connor*, 119 Ill. 586;

² *Railway Co. v. Johnson*, 135 Ill. 641; *Lake Shore & M. S. R. Co. v. Ouska*, 151 Ill. 237, 37 N. E. 897.

train approaching, stepped from the track to let it pass, and immediately afterwards stepped upon the track, when he was struck by a detached portion of the train following. It was held that this instruction violated the rule stated to prevail in this state, in that it directs the jury that, if certain facts exist, negligence is established.

Yet the following instruction was held not to violate such rule, but was a correct statement of the law: "If the jury believe from the evidence that the deceased could have seen that the train was parted, if he looked before he walked onto the track, and that he did not look or take any means whatever to ascertain whether he could safely enter upon the railroad track, and that it was not possible to have stopped the train, after he entered the track, in time to avoid a collision with him, then the jury will find for the defendant."¹

1341. Where an employee of a railroad company was sent on a wrecking train to assist in removing the *debris* of a wrecked train from the track, and, instead of taking his seat in the car, in violation of a published rule of long standing he entered the locomotive and took a seat with the fireman, just in front of the latter, where he remained until a collision took place with a freight train, it was held, as matter of law, he was guilty of such negligence in taking an extra hazardous place as to bar a recovery, notwithstanding the negligence of the servant in charge of the train.²

1342. In an action by a conductor to recover for injuries received while attempting to uncouple a car having no ladders or handles at the end, it was held error to refuse the following instruction: "That it was the duty of the plaintiff, before attempting to uncouple the car in question, to use ordinary and reasonable care to ascertain whether it was safe to do so or not while the train was in motion, and if the jury believe from the evidence that it was not safe for the plaintiff to uncouple said car at the time he attempted to, and the plaintiff knew, or might by the exercise of ordi-

¹ Myers, Adm'x, v. Indiana & St. Louis R. Co., 113 Ill. 386.

² Abend v. Terre Haute & Ind. R. Co., 111 Ill. 202.

nary care have known, it was not safe to attempt it, then he could not recover.”¹

1343. It was held proper to refuse the following instruction upon the ground that it is not the office of the circuit court to determine what circumstances will be sufficient to charge a plaintiff with want of ordinary care, or such want of care as will cut off a right of recovery. The law required of the plaintiff that he should use ordinary care, considering his surroundings; that is, such care as men of ordinary prudence would usually exercise under the same or like circumstances. By asking this instruction, the court was called upon to usurp the province of the jury, and direct them, in substance, as to what circumstances would show or constitute a want of ordinary care.

The instruction thus refused was as follows: “The law, for wise purposes, requires every sane man to use and employ his reason and his senses under all ordinary circumstances of life; and if the jury believe from the evidence that the plaintiff or brakeman, before the injury complained of, enjoyed fair and reasonable opportunities for acquiring a knowledge of the condition of said bridge and the danger arising therefrom, if any there was, but ignoring such opportunities, and refusing or neglecting to avail himself thereof, wilfully or negligently remained in ignorance of the condition of said bridge, if the same was dangerous, he cannot take or derive any advantage from such ignorance, but his rights are to be determined the same as if he possessed the knowledge he might have acquired by the reasonable exercise of his faculties.”²

1344. It was said by the supreme court, in reviewing an opinion of the appellate court which stated the law to be that “while questions of negligence or of contributory negligence are ordinarily questions of fact to be passed upon by a jury, yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in

¹ C., B. & Q. R. Co. v. Warner, 108 Ill. 538.

² Wabash Ry. Co. v. Elliott, 98 Ill. 481.

opposition to it, the court may withdraw the case from the consideration of the jury and direct a verdict," we think the evidence of contributory negligence on the part of the plaintiff is so clear and convincing that no verdict in favor of the plaintiff on those issues should have been allowed to stand. Under these circumstances it became the duty of the trial court to direct a verdict for the defendant.¹

O. *North Carolina Rule.*

1345. In North Carolina what constitutes negligence or reasonable diligence is a question of law to be decided by the court. The facts appearing, the court decides that there is or is not negligence, as the case may be.²

P. *Burden of Proof.*

1346. Alabama.—Contributory negligence is defensive matter, which must be pleaded and proved by the defendant. The complaint in personal-injury cases need not negative the fact that the plaintiff knew, or by reasonable diligence might have known, the defect or negligence charged.³

1347. The statute of Alabama (Act of Feb. 28, 1887) providing that, when any person is injured by a locomotive or cars of a railroad, the burden of proof is on the railroad company to show that the engineer had blown the whistle at certain times and places, stopped the train for obstructions on the track, etc., does not apply to a case where an employee has been injured while engaged in his regular duty of moving cars, and the burden of proving that the company is guilty of negligence is on such employee.⁴

1348. Arkansas.—Contributory negligence is a defense to be affirmatively proved. It will be presumed that the

¹ *Werk v. Illinois Steel Co.*, 154 Ill. 427, 40 N. E. 442.

² *Pleasants v. Raleigh & A. A. L. Co.*, 95 N. C. 195.

³ *Mobile & Ohio R. Co. v. George*, 94 Ala. 199, 10 So. 145.

⁴ *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. 146.

injured party was in the exercise of due care until the contrary is made to appear.¹

1349. Arizona.—In an action for wrongful death the burden of proving contributory negligence is on defendant.²

1350. California.—In California it is not necessary for the plaintiff to aver or prove that he himself was without fault.³

1351. Colorado.—The general rule at common law is that contributory negligence is a defense in actions where the defendant is charged with negligence, and when clearly established by evidence substantially uncontradicted is to be adjudged a defense, as matter of law, by the court.⁴

1352. If the evidence in the most favorable light in which it may be reasonably considered in behalf of the plaintiff shows the plaintiff was guilty of negligence which contributed to the cause of injury as alleged, and without which the injury would not have happened, then the court may properly nonsuit the plaintiff or direct a verdict for the defendant; but if the evidence be contradictory in any substantial matter on the question of contributory negligence, then such question should be submitted to the jury under proper instructions.

Where there is no conflict in the testimony bearing upon the subject, either of negligence or contributory negligence, the court may, in a clear case, treat the question as one of law, and grant a nonsuit or direct a verdict; but when the determination of the question depends upon the inference to be drawn from a variety of facts and circumstances, in the consideration of which there is room for a substantial difference of opinion between intelligent and upright men, then the question shall be submitted to the jury under appropriate instructions, even though there may be no conflict in the testimony.

¹ *Little Rock & Ft. S. R. Co. v. R. Co.*, 48 Cal. 409; *McQuilken v. C. Eubanks*, 48 Ark. 460, 3 S. W. 808. P. R. Co., 50 Cal. 7; *Smith v. Occidental & O. S. Co.*, 99 Cal. 462.

² *Southern Pac. R. Co. v. Tomlinson*, 33 Pac. 710.

⁴ *Victor Coal Co. v. Muir*, 20 Colo.

³ *Magee v. N. P. C. R. Co.*, 78 Cal. 320.
430; *Robinson v. Western Pacific*

It was held that a person was guilty of contributory negligence, as a matter of law, who attempted to pass between cars upon a track through an opening between them two feet wide.¹

1353. Connecticut.—It is incumbent upon a plaintiff who seeks redress for injuries occasioned by the alleged negligence of the defendant to prove that he was in the exercise of due care at the time, and this by a fair preponderance of the evidence.²

1354. Delaware.—In order to hold an employer responsible for the acts or omissions of his agents, where the rights of others are concerned, such acts or omissions must be proved, and also it must appear that the plaintiff was not guilty of any contributory negligence.³

1355. Florida.—The Georgia statute has been adopted. The rule is the same.

1356. Georgia.—In an action for damages against another than a railroad company for injuries occasioned by negligence, the plaintiff need only prove his injury and the negligence of the defendant by which it was caused in order to make out a *prima facie* case. Whether or not by the exercise of proper diligence he could have prevented the injury is a matter of defense.⁴

1357. Idaho.—Contributory negligence of the plaintiff, if relied upon by the defendant, is a defense to be established by the defendant.⁵

1358. Illinois.—The burden is on the plaintiff not only to show negligence of the defendant, but also the exercise of due care on his own part.⁶

¹ Lord v. Pueblo Smelting & Refining Co., 12 Colo. 390.

² Ryan v. Town of Bristol, 63 Conn. 26, 27 Atl. 309.

³ Stewart v. Philadelphia, W. & B. R. Co., 8 Houst. (Del.) 450, 17 Atl. 639.

⁴ City Council of Augusta v. Hudson, 88 Ga. 599, 15 S. E. 678.

For rule under the statute relating to railroad companies, see FELLOW-SERVANT. GEORGIA.

⁵ Hopkins v. Utah Northern R. Co., 2 Idaho, 277, 13 Pac. 343.

⁶ Aurora Branch R. Co. v. Grimes, 13 Ill. 585; Kepperley v. Ramsden, 83 Ill. 354; Abend v. T. H. & I. R. Co., 111 Ill. 202.

1359. The law does not always require positive proof of due care and diligence on the part of the plaintiff. Under certain circumstances it may be taken for granted that he observed usual and ordinary care for his personal safety. So, where an engineer upon a railroad, who was killed by defects in a foot-board, was shown to be a careful and competent servant in his employment, and he was seen a few moments before his death in the observance of due care, it was held that it could not properly be said there was an entire want of evidence on this branch of the case.¹

1360. Where the negligence of the defendant is gross, the exercise of due care on the part of the plaintiff may be regarded as proved, where it is shown that the negligence of the plaintiff was, in comparison, slight, but the burden, even in that case, is on the plaintiff to show that he was free from such negligence as would defeat the action.²

1361. Indiana.—The burden of proof of negligence of defendants, and absence of contributory negligence of plaintiff, is on the latter, but it will be sufficient if these facts appear either directly or circumstantially. It is only where the facts and circumstances surrounding the injury point neither one way nor the other that the plaintiff must fail for the want of affirmative proof.³

1362. An averment in a complaint that plaintiff was himself without fault is sufficient to exclude the existence of contributory negligence. The plaintiff, however, must aver facts showing that the danger which augmented the risks of his service was not known to him.⁴

1363. Iowa.—In Iowa, the plaintiff alleging negligence must prove that he was not guilty of negligence contributing

¹ Missouri Furnace Co. v. Abend, 107 Ill. 44; Chicago, B. & Q. R. Co. v. Clark, 92 Ill. 43.

² Indianapolis & St. L. R. Co. v. Evans, 88 Ill. 63; Chicago, B. & Q. R. Co. v. Harwood, Adm'x, 90 Ill. 425.

³ Cincinnati, H. & D. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. 287.

⁴ Louisville, N. A. & C. R. Co. v. Sandford, 117 Ind. 265, 19 N. E. 770; Lake Shore & M. S. R. Co. v. Stupak, 108 Ind. 1; Railway Co. v. Dailey, 110 Ind. 75; Fort Wayne, C. & L. R. Co. v. Gruff, 132 Ind. 13, 31 N. E. 460.

to the injury. This does not require direct and positive proof, but the fact may sometimes be fairly and reasonably inferred from circumstances.¹

1364. Contributory negligence is not a defense; its absence is a matter to be pleaded and proved to justify a recovery. It is proper for the jury to consider the natural instinct of self-preservation, as direct and positive evidence is not required to show an absence of negligence. If it may be inferred from all the evidence in the case, it is sufficient. But it will not do to say that one can go upon a railroad track without having a duty there, and if, while walking, he is struck by a train, the jury may assume from the instinct of self-preservation alone that he was diligent. In reference to the facts it was said: "If he exercised the sense of hearing, he must have heard the train in time to get off the track. If he did not hear it, it was because he was not attentive. And in either case it was negligence." The facts overcome any presumption to arise from the rule as to the instinct of self-preservation."²

1365. Direct and positive evidence that the deceased did not, by his own negligence, contribute to the injury is not required. Where such evidence cannot be obtained, it is proper for the jury to consider the instinct of men which naturally leads them to avoid danger, as evidence of due care on the part of the person injured.³

1366. Kansas.—In an action against a railroad company to recover damages for personal injury to an employee, occasioned by the negligence of a co-employee, it is unnecessary for the plaintiff to aver that there was no fault or negligence on the part of the injured person. Contributory negligence is a matter of defense.⁴

1367. Kentucky.—Though contributory negligence is a defense which confesses and avoids plaintiff's case, and must

¹ *Murphy v. C., R. I. & P. R. Co.*, 45 Ia. 661.

² *Baker v. C., R. I. & P. R. Co.* (Iowa), 63 N. W. 667.

³ *Hopkinson v. Knapp & Spaulding Co.* (Iowa), 60 N. W. 653.

⁴ *Missouri Pac. R. Co. v. McCally*, 41 Kan. 639, 21 Pac. 574; *Railroad Co. v. Phillibert*, 25 Kan. 405.

be affirmatively pleaded, yet where the petition itself states facts showing that plaintiff was guilty of such contributory negligence as to prevent his recovery, the question may properly be raised by demurrer.¹

1368. Louisiana.—To recover damages for personal injuries received from a railroad company, it is necessary for plaintiff to show that the accident in consequence of which the injuries were received was caused by the negligence of the company, and that the plaintiff was not guilty of any negligence which aided the accident.²

1369. Maine.—The burden of proof in actions for personal injuries is on the plaintiff to show that the injured party was in the exercise of due care and diligence at the time of the injury, or at least that the want of such care on his part in no way contributed to produce it. It is not enough to show that the defendant was negligent. It is incumbent on the prosecuting party to go further and directly or indirectly, by affirmative proof, satisfy the jury that no want of due care on the part of the injured party helped to produce the accident.³

1370. Maryland.—In an action against a railroad company for the death of a servant, alleged to have resulted from defendant's negligence, the declaration is defective if it fails to negative the existence of contributory negligence on the part of deceased.⁴

1371. It was held in a former case that the burden of showing contributory negligence on the part of the plaintiff rests upon the defendant as well in suits occasioned by defects in county roads and bridges as in actions against railroad companies for injuries occasioned by them.⁵

¹ Favre v. Louisville & N. R. Co., Me. 538; Same Case, 76 Me. 357; 91 Ky. 541, 16 S. W. 370; Railroad Benson v. Titcomb, 72 Me. 31.

Co. v. Hoehl, 12 Bush, 41; Railroad
Co. v. Thomas, 79 Ky. 160. ⁴State to use of Dodson v. Balt. & L. R. Co. et al., 77 Md. 489, 26 Atl. 865.

²Deikman v. Morgan's L. & T. R. & S. S. Co., 40 La. Ann. 787, 5 So. 76. ⁵County Commissioners v. Burgess, 61 Md. 29.

³State v. Maine Cent. R. Co., 77

1372. Massachusetts.— Wherever there is negligence on the part of the plaintiff contributing directly as a proximate cause to the occasion from which the injury arises, such negligence will prevent the plaintiff from recovering; and the burden is always on him to establish either that he was in the exercise of due care or that the injury is in no degree attributable to any want of care on his part.¹

1373. It is not necessary, however, that the plaintiff should prove due care on his part by directly affirmative evidence; that inference may be drawn from absence of all appearances of fault on his part.²

1374. Massachusetts statute.— The statute of Massachusetts of 1887, known as the Employers' Liability Act, and exempting from the right to recover for personal injuries employees who, knowing the danger of their employment, fail to give information thereof, does not require an employee to prove his ignorance of any danger, or the giving of information, before he can recover, but the burden of such matter is upon the defendant.³

1375. Michigan.— The *gravamen* of an action for damages for negligent injury is that the plaintiff has been damnified by the wrongful and negligent conduct of defendant without having contributed thereto by his own negligence, and as the absence of contributory negligence is a part of his own case, he should show that he acted with due care. But it is enough if he merely puts in evidence the facts and circumstances attending the injury, and if these show negligent conduct in the defendant, from which the injury followed as a direct and proximate consequence, and do not show contributory negligence, a *prima facie* case is established.⁴

¹ *Murphy v. Deane*, 101 Mass. 455; *Co.*, 72 Mass. 64; *Caron v. Boston Tully v. Fitchburg R. Co.*, 134 Mass. 499. & *Albany R. Co.*, 164 Mass. 523.

³ *Connolly v. City of Waltham*,

² *Mayo v. Boston & M. R. Co.*, 104 156 Mass. 368, 31 N. E. 302.

Mass. 137; *Peverly v. Boston*, 136 ⁴ *Teipel v. Hilsendegen*, 44 Mich. *Mass.* 366; *Lucas v. N. B. & T. R.* 461.

1376. Minnesota.— The burden is upon the defendant to prove contributory negligence on the part of the plaintiff.¹

1377. The statute of 1887, subjecting railroad companies to liability to their servants for the negligence of fellow-servants, does not change the rule as to the burden of proof of contributory negligence.²

1378. Mississippi.— The universal rule is that the injury must proceed wholly and solely from the defect (this was a case of defective highway); that the plaintiff must be entirely free from any negligence which contributed to the result, and that the burden of showing affirmatively that he exercised at least ordinary care and prudence is upon him. Unless he establishes this he must fail, notwithstanding he has shown the greatest remissness on the part of the corporate authorities.³

1378a. Contributory negligence of an employee in an action against the master is matter of defense.⁴

1379. Missouri.— Contributory negligence is a defense, the burden of proving which is on the defendant.⁵

1380. It devolves upon the defendant, not the plaintiff, to plead and prove want of care or contributory negligence on the part of the plaintiff. This is the settled rule in this state.

In cases where the defendant is injured by defective machinery, it is not incumbent upon the plaintiff to prove want of knowledge of the defect in the appliance. That is matter of defense. (Citing *Young v. Iron Co.*, 103 Mo. 324, 15 S. W. 771.)

The same rule applies where the servant is suing for injuries occasioned by the negligence of an incompetent servant.⁶

¹ *Greene v. Minneapolis & St. Louis R. Co.*, 31 Minn. 248.

² *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391, 51 N. W. 125.

³ *City of Vicksburg v. Hennessy*, 54 Miss. 391.

⁴ *Buckner v. Richmond & D. R. Co.*, 72 Miss. 873, 18 So. 449.

⁵ *Bluedorn v. Missouri Pac. R. Co.*, 121 Mo. 258, 24 S. W. 57.

⁶ *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475, 18 S. W. 1098.

1381. Montana.—In an action for injuries, contributory negligence is a matter of defense, and the plaintiff is not required to prove its absence as a part of his case. When, however, the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him.¹

1382. Nebraska.—Contributory negligence is a matter of defense, and the burden of its proof is on the defendant. If the plaintiff proves his case without disclosing any contributory negligence, he will be assumed to be free therefrom.²

1383. New Hampshire.—The rule in this state appears to be that contributory negligence is a matter of defense.³

1384. New Jersey.—Contributory negligence is a matter of defense, yet if it clearly appear at the close of the plaintiff's evidence, the court should nonsuit.⁴

1385. If the case presents a fairly debatable question whether the plaintiff's negligent conduct contributed to the injury, the solution of that question is for the jury; but if it clearly appears that such conduct did contribute to the production of the injury, then the court should control the case and direct a nonsuit.⁵

1386. New York.—In cases where contributory negligence may be claimed, it is settled that the absence of contributory negligence is part of the plaintiff's case, and the burden of satisfying the jury on that point rests upon him. If the evidence leaves it in doubt, the defendant is entitled to the benefit of the doubt.⁶

1387. Cases may arise where proof of the facts of itself shows there was no contributory negligence; but where there is no evidence as to what actually did take place at the time,

¹ *Nelson v. City of Helena* (Mont.), 39 Pac. 905.

² *Union Stock Yards Co. v. Conoyer*, 41 Neb. 617, 59 N. W. 950.

³ *Smith v. Eastern R. Co.*, 35 N. H. 356.

⁴ *Berry v. Pennsylvania Co.*, 19 Vroom, 141 (N. J. L.).

⁵ *Pennsylvania R. Co. v. Righter*, 13 Vroom, 180.

⁶ *Hale v. Smith*, 78 N. Y. 480; *Hart v. Hudson Riv. Bridge Co.*, 84 N. Y. 56.

and the proof is such as to render it uncertain in regard to that subject, it cannot be said that absence of such negligence is established within the rule referred to. In such a case no inference can legitimately be drawn in favor of the plaintiff within the rule stated in *Powell v. Powell*, 71 N. Y. 77.¹

1388. North Carolina.—The question upon whom the burden rests, where contributory negligence is involved, is still an open one in this state. In *Doggett v. Railway Co.*, 78 N. C. 305, the statement is made that “the danger was imminent, and the law imposes the burden upon the plaintiff of showing that he was not negligent.”

In *Owens v. Railway Co.*, 88 N. C., on page 517, one of the justices expressly states that up to that time it had been an open question, and hoped that the court would settle it. He favored the rule which placed the burden on the defendant. The rule of several states is discussed by the chief justice, rendering the opinion of the court, but is not decided any further than what is stated, to wit: “While we do not undertake to reconcile the divergent decisions in reference to the burden of proof, we think a clear deduction from them, and as well supported by sound reasoning, is that if, in disclosing the facts which constitute the defendant’s negligence, it does not appear whether the plaintiff exhibited the necessary watchfulness and care to avoid the consequent harm or injury, it will be assumed there was no such want of it on his part; and if the plaintiff in any legal sense was the cause, or the concurring cause, of his own injury, the duty of so showing in self-exculpation devolves upon the defendant. The inference of this co-operating agency may be drawn from the plaintiff’s proofs of the defendant’s neglect or misconduct, as well as by substantial and independent testimony produced by the defendant.”

1389. Ohio.—It is only where the injury is shown by the plaintiff, and there is nothing that implies that his own negligence contributed to it, that the burden of proving contributory negligence can properly be said to be cast upon the

¹ *Hart v. Hudson Riv. Bridge Co.*, 84 N. Y. 56.

defendant; for where the plaintiff's own case raises the suspicion that his own negligence contributed to the injury, the presumption of due care on his part is so far removed that he cannot properly be relieved from disproving his own contributory negligence by casting the burden of proving it upon the defendant, the same as if the presumption in favor of the plaintiff was unquestioned in his own case. The question should be left, upon the whole evidence, to the determination of the jury, with the instruction that the plaintiff cannot recover if his own negligence contributed to the injury.¹

1390. Oregon.—Contributory negligence is a defense and must be averred as such, and where the injury results from the direct act or omission of the defendant, which *prima facie* is negligence itself, and the plaintiff receives an injury in consequence thereof while pursuing the ordinary course of his affairs, he will not be compelled, in order to recover his damages, to prove that he was free from fault. The burden is on the defendant, in case of personal injuries caused by defective appliances, to show that the servant did not know of the defect and that his negligence contributed to the injury.²

1391. Pennsylvania.—In actions to recover damages received on account of the negligence of the defendant, it has sometimes been said that the plaintiff must present a case clear from contributory negligence. The obvious meaning of that and similar forms of expression is, that the burden is on the plaintiff to prove that the injury complained of was caused by defendant's negligence, and if in so doing the fact is disclosed that his own negligence contributed to the result, there can be no recovery, because the case as thus presented by the plaintiff is not clear of contributory negligence. It was never intended to mean that the plaintiff, after first proving affirmatively that the defendant's negligence caused the injury, must also prove negatively that he

¹ Robinson v. Weaver et al., 28 Ohio St. 241.

² Johnston v. Oregon S. L. & U. N. R. Co., 23 Oreg. 94, 31 Pac. 283.

himself was not guilty of any negligence that contributed to the result.¹

1392. Rhode Island.—Where the plaintiff shows negligence on the part of the defendant, and there is nothing to imply that the plaintiff brought on the injury by his own negligence, then the burden of proof is on the defendant to show that the plaintiff was guilty of negligence.²

1393. South Carolina.—Ever since the case of *Carter v. Railroad Co.*, 19 S. C. 20, if not before, it has been settled in this state that a nonsuit cannot be granted upon the ground that the evidence shows contributory negligence on the part of the plaintiff, for the very obvious reason, as stated in that case, that it involves the decision of a question of fact, of which, under the constitution, the jury alone has cognizance in a law case. Contributory negligence is a matter of defense, and presents a question of fact to be solved by the jury.³

1394. Tennessee.—The court declined to decide the question as to where lies the burden of proof in cases where contributory negligence is involved, as an abstract proposition. It quotes from Beach, section 417, and Sharman & Redfield, section 106. It was held, however, where a child, after being placed by its father in the care of a relative, was killed while on defendant's tracks, that the burden was upon the father, suing as administrator, to show that neither himself nor the child's custodian was guilty of contributory negligence.⁴

1395. Texas.—It is incumbent upon the plaintiff, suing for injuries received by an employee, to show how and under what circumstances the accident occurred; how he was employed at the time, and what the facts were constituting the negligence of the defendant; and if his own conduct was connected with the negligence of the defendant so as to

¹Bradwell v. Pittsburg & W. E. P. R. Co., 139 Pa. St. 404, 20 Atl. 1046; Baker v. Westmoreland, etc. Gas Co., 157 Pa. St. 593, 27 Atl. 789. ³Whaley v. Bartlett et al., 42 S. C. 454, 20 S. E. 745. ⁴Bamberger v. Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163.

²Cassidy v. Angell, 12 R. I. 447.

bring about the injury, to show what connection, and in so doing to acquit himself of carelessness or establish the fact that he was exercising due care; for if, in the necessary statement of his own case and his connection with it, it appears that he was negligent or that he failed to exercise proper caution, he cannot recover. He cannot recover unless he shows how the injuries were received.

After proof of his case establishing the negligence of the defendant, and his own acts immediately connected therewith as free from fault, there may be yet such negligence on his part, independent of his *prima facie* case, as will discharge the defendant of liability, and which, to become available as a defense, must be alleged and proved by the defendant.

It is not necessary that the petition should negative, either by facts stated or by direct averment, the existence of contributory negligence on the part of the plaintiff. An exception to this rule exists where the petition from its averments would establish, if unexplained, a *prima facie* case of negligence of the party injured. If the defendant relies upon contributory negligence not developed by plaintiff's case, he must allege it. It is a defense in the nature of avoidance.¹

1396. After the plaintiff has proved the negligence charged and the resulting injury, and that such injury was not caused by contributory negligence on his part, the burden of proof of contributory negligence shifts to the defendant.²

1396a. The burden of proving contributory negligence in a suit by an employee is on the defendant.³

1397. United States court.—The burden of proving contributory negligence rests upon the defendant, and it will not avail the defendant unless it has been established by a preponderance of evidence. This does not imply that the defendant can have no benefit of it if it is established by

¹ *Murray v. Gulf, C. & S. F. R. Co.*, 73 Tex. 2, 11 S. W. 125.

³ *Missouri, K. & T. R. Co. v. Hogan*, 88 Tex. 679, 32 S. W. 1035.

² *Gulf, C. & S. F. R. Co. v. Redeker*, 67 Tex. 181, 2 S. W. 513.

plaintiff's evidence, nor that the fact can only be made effectual by a preponderance of evidence coming exclusively from the party upon whom rested the burden of proof.¹

1398. Vermont.—It is not necessary, especially in cases of injury from defective highways, that the plaintiff shall establish affirmatively in the outset that he was not guilty of negligence or a want of care in his own conduct or management, in order to show an apparent right of recovery. Where the defect is conceded or proved, the plaintiff is bound to give sufficient evidence to establish *prima facie* that he sustained an injury by reason of such defect. If the plaintiff's own evidence shows that his conduct on the occasion was careless or negligent, and that such carelessness or negligence aided or contributed to the injury he received, he establishes a defense to his action by his own evidence, as much as if the same fact were proved by the defendant. But if the plaintiff's proof discloses nothing but that his conduct at the time was proper and prudent, he is not bound to go further until this has been impugned by some evidence on the other side. The plaintiff in such case is bound to make out affirmatively that his damage was caused by the defect in the highway in order to recover. Evidence which proves affirmatively that the injury was caused by the defect in the highway must necessarily show, to a certain extent, negatively that it was not caused by anything else. To this extent, and this only, can it be said that the burden of proof is on the plaintiff in such case to show in the outset of his case that his own negligence did not cause or contribute to his injury.²

1399. Virginia.—The burden is upon the defendant to prove contributory negligence on the part of the plaintiff. The law presumes a party to have been in the exercise of ordinary care.³

¹Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Hough v. Railway Co., 100 U. S. 213.

²Hill, Adm'r, v. Town of New Haven, 37 Vt. 501.

³Baltimore & Ohio R. Co. v. McKenzie, 81 Va. 71; Sheeler's Adm'r v. C. & O. R. Co., 81 Va. 188.

1400. Washington.— In actions by an employee against the employer for personal injuries, the burden of proof as to contributory negligence of such employee rests upon the defendant.¹

1401. West Virginia.— A servant who seeks to recover for an injury which he claims resulted from defective machinery or appliances furnished by the master, to be used about the business in which such servant was employed, takes upon himself the burden of establishing negligence on the part of the master and due care on his own part, and in order to entitle him to recover he must overcome two presumptions: First, that the master has discharged his duty to him by providing suitable machinery and appliances for the business, and keeping them in that condition; second, that he assumed all the usual and ordinary hazards of the business.²

1402. Wisconsin.— Contributory negligence of the plaintiff is an affirmative defense. Such defense is admissible under a general denial.³

1403. Utah.— Contributory negligence is a matter of defense.⁴

¹ Northern Pac. R. Co. v. O'Brien,
1 Wash. 599, 21 Pac. 32.

² Johnson v. Chesapeake & O. R.
Co., 36 W. Va. 73, 14 S. E. 432.

³ McQuade v. C. & N. W. R. Co.,
68 Wis. 616, 32 N. W. 633.

⁴ Woods v. Railway Co., 9 Utah,
146; Smith v. Railway Co., 9 Utah,
141.

CHAPTER VIII.

EMPLOYMENT OF SERVANTS.

- A. *Rule*, 1404 et seq.
- B. *Retention of Servants*, 1411 et seq.
- C. *Diligence is Presumed*, 1418 et seq.
- D. *When Presumption of Diligence May be Overcome*, 1432 et seq.
- E. *Knowledge by Agent or Servant, when Chargeable to the Master*, 1445 et seq.
- F. *Incompetency, Evidence of*, 1459 et seq.
 - 1. Incapacity, 1459 et seq.
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 - 5. Repeated or Habitual Acts, 1489 et seq.
 - 6. Reputation, 1494 et seq.
 - 7. Specific Acts, 1505 et seq.
- G. *Knowledge by Servant*, 1526 et seq.
- H. *Number of Servants*, 1562 et seq.
- I. *Personal Duty of Master*, 1584 et seq.

A. *Rule.*

1404. The undertaking on the part of the master is not that each or any of his employees are skilful and competent, but that he has exercised and will exercise due care in their selection and employment as to their skilfulness and competency.¹

1405. When reasonable precautions and efforts to procure safe and skilful servants are used, and, without fault, one is employed through whose incompetency damage occurs to a fellow-servant, the master is not liable.²

¹ Wright v. N. Y. C. R. Co., 25 N. Y. 562; Snow v. Housatonic R. Co., 8 Allen, 441; C. & G. E. R. Co. v. Harney, 28 Ind. 28; C., C. & I. R. Co. v. Troesch, 68 Ill. 545; Baulec v. N. Y. & H. R. Co., 59 N. Y. 356; Moss v. Pacific R. Co., 49 Mo. 167; Philadelphia & R. R. Co. v. Trainor, 137 Pa. St. 148, 20 Atl. 632; Lewis v. Seifert, 116 Pa. St. 628; Weger v. Railway Co., 55 Pa. St. 460.

² Baulec v. N. Y. & H. R. Co., 59 N. Y. 356.

1406. A railroad company owes its employees the duty of employing, so far as it can with reasonable care, only competent men in the management of its road; that is, men who can be relied upon to execute the rules of the master, unless prevented by causes beyond its control. The competency of a servant depends not alone upon physical or mental attributes, but upon the disposition with which he performs his duties.¹

1407. The duty of a railroad company is to exercise reasonable and ordinary diligence, having respect for the exigencies of the particular service required, to the end that it may ascertain the qualifications and competency of a conductor; in employing subordinates, to exercise a degree of care commensurate with the responsibilities of the position and with the consequences which might ensue from incompetency or unskilfulness on the part of those employed. In case peculiar fitness is required, unless it was assured by previous like service, the duty of such company requires it to institute affirmative inquiries in order to ascertain his qualifications in that regard.²

1408. If the master makes careful inquiry into the habits and competency of the men employed, and upon such inquiry believes and has reason to believe them sober, competent and careful, he can do no more. He has honestly and faithfully endeavored to do his duty, and there is no contract for anything more. This was stated in sustaining a demurrer to a complaint which merely alleged "that notwithstanding the master's duty to employ careful and skilful servants he failed so to do." The complaint was held insufficient in not charging a want of care and diligence in the performance of this duty.³

1408a. A master cannot be charged with negligence in the employment of a servant merely because he omitted to

¹ *Coppins v. N. Y. C. & H. R. R.* 167. See, also, *McDermott v. Railway Co.*, 30 Mo. 116; *Elliot v. Railway Co.*, 67 Mo. 272; *Norfolk & W. R. Co. v. Nuckols (Va.)*, 21 S. E. 342.

² *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450.

³ *Moss v. Pacific R. Co.*, 49 Mo.

question the employee himself as to his competency, skill and carefulness at the time of his employment, if he made such inquiries of his former employers.¹

1409. It was said that the same degree of care which a railroad company should take in providing and maintaining its machinery must be observed in selecting and retaining its employees, including operators. Ordinary care on its part implies, as between it and its employees, not simply that degree of diligence which is customary among those intrusted with the management of railroad property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered.²

1410. If a master who takes no personal part in the management of his business has any duty to perform towards his servant, it is difficult to say that it is always performed by doing two things, namely, by employing competent servants and by furnishing ample means. In order that the business may be properly managed, the servants should not only be competent, but they should be numerous enough to do, and they should have the means of doing, whatever ought reasonably to be done, and such regulations should be properly established as will secure the requisite subordination and control, and the exercise of reasonable intelligence and care in the conduct of the business; and it is almost as difficult to define all the duties of the master in this respect as to define the duties of a person under other relations.³

B. Retention of Servant.

1411. Rule.—The master's duty in respect to the employment of servants is not satisfied by the hiring of capable

¹ *Gier v. Los Angeles Con. E. R. Co.*, 108 Cal. 129.

³ *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198.

² *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454.

and competent persons in the first instance, but he is also required to exercise such an oversight and supervision of such servants that if they afterwards become habitually or notoriously incompetent or unfit from carelessness or bad habits to perform their duties, this incompetency, if long continued, should be discovered and guarded against.¹

1412. The extent of the master's undertaking is that he will exercise reasonable care in the selection of an employee, and when his incompetency is discovered will dismiss him from the service.²

1413. While the duty of the master to his servant requires the exercise of great care in the employment of fellow-servants, and the institution of affirmative inquiries to ascertain their character and qualifications, when suitable and competent persons have been employed the same degree of diligence is not thereafter required. Good character and qualifications once possessed may be presumed to continue, and the master may rely upon that presumption until notice of change, or knowledge of such facts as would be deemed equivalent to notice, or such at least as would put a reasonable man on his guard.³

1413a. Where due care has been exercised in the employment of a servant, and injury is caused by his act to another employee, no recovery can be had, unless it appears that the former had become and actually was unfit or incompetent through negligence or incapacity, that the injury happened by reason thereof, and that the employer had knowledge of his incapacity, or his general reputation was so in accord with the fact that the employer was presumed to know of it.⁴

1414. Until informed to the contrary, the master has the right to presume that an agent or officer carefully chosen will use good judgment in doing his duties, and he has a right to

¹ *Whittaker v. D. & H. C. Co.*, 126 N. Y. 544.

² *C. & I. R. Co. v. Troesch*, 68 Ill. 545.

³ *Chapman v. Erie R. Co.*, 55 N. Y. 579.

⁴ *Gier v. Los Angeles Con. E. R. Co.*, 108 Cal. 129.

rest upon that belief until, in the exercise of that general vigilance which devolves upon him, he finds he has been mistaken; and as all men are liable to errors, no one can be bound to treat an agent as incompetent unless for some error or misconduct going to his general fitness for the place.¹

1415. It is the duty on the part of the master to exercise reasonable care in the supervision of the conduct of his servants, with a view to ascertain whether they are fit and competent persons to be retained, but this duty must be performed with reference to the nature of the employment. It is required that a closer supervision be exercised over the habits and conduct of an engineer than of a brakeman or laborer.²

1416. When a master employs a competent and careful servant he has a right to rely upon the presumption that he will continue careful and skilful, and when notified that he has become careless he is not ordinarily bound to discharge him without an investigation into such charge, unless such notice is accompanied with such evidence as leaves no reasonable doubt of the truth of such charge. A rule that would require the master to discharge a servant, careful and competent when employed, without investigation, upon a charge of carelessness, would be a harsh one and would often result in great injustice to employees.³

1417. The master's responsibility is not for the negligence of his servant, but for his own. He does not warrant their competency. To recover for an injury caused by the incompetency of a fellow-servant, it must be shown that such incompetency was known, or should have been known to the master if he had been in the exercise of ordinary diligence. While the duty of the master to his servant requires great care in the employment of fellow-servants, and the institution of due inquiry to ascertain their character and

¹Michigan Central R. Co. v. Dolan, 32 Mich. 510.

³Lake Shore & M. S. R. Co. v. Stupak, 123 Ind. 210.

²Hilts v. C. & G. T. R. Co., 55 Mich. 437, 21 N. W. 878.

qualifications, when suitable and competent persons had been employed the same degree of diligence is not required. Good character and proper qualifications once possessed may be presumed to continue, and the master may rest upon that presumption until notice of a change.¹

C. Diligence is Presumed.

1418. Rule.—The presumption is, in an action between an employee and the master, that the master exercised due care in the selection and retention of his servants, and that he did not have knowledge of the defects of capacity or character imputed.²

1419. The burden of proof is upon the plaintiff to show that the defendant failed to exercise ordinary care and prudence in the selection of servants. The mere fact of the incompetency of a servant is not enough to warrant a jury in finding the master guilty of negligence in employing him. It is, however, true that the character of testimony offered to establish a servant's incompetency in fact may be such as to warrant the inference that the master had notice or failed to make proper inquiry.³

1419a. The burden of proof as to the unfitness of a servant and want of care in his employment, as well as notice of his unfitness, is on the employee who seeks to charge the employer.⁴

1419b. Incompetency of the servant and negligence on the part of the master in employing him or retaining him in the service must appear in order to charge the master.⁵

¹Blake v. Maine Central R. Co., 70 Me. 60.

²Davis v. Detroit & M. R. Co., 20 Mich. 105; Mich. Cent. R. Co. v. Dolan, 32 Mich. 509; Mich. Cent. R. Co. v. Gilbert, 46 Mich. 176; Stafford v. C., B. & Q. R. Co., 114 Ill. 244; Columbus, C. & I. R. Co. v. Troesch, 68 Ill. 545; Chicago & Eastern Ill. R. Co. v. Geary, 110 Ill. 383.

³Murphy v. St. L. & I. M. R. Co., 71 Mo. 202; McDermott v. H. & St. J. R. Co., 87 Mo. 285. See Roblin v. K. C., St. J. & C. B. R. Co., 119 Mo. 476.

⁴Gier v. Los Angeles Con. R. Co., 108 Cal. 129.

⁵Kindel v. Hall (Colo. App.), 44 Pac. 781.

1419c. The burden is on the plaintiff.¹

1420. The mere fact that a fellow-servant is incompetent does not tend, even *prima facie*, to establish negligence on the part of the master in employing him, but the burden in all such cases is upon the servant to establish the fact that the injury resulted to him because the master did not exercise reasonable and proper care in the employment of such, and this must be established as a fact in the case, and cannot result as an inference from the circumstance that the servant was in fact incompetent.²

1421. It must appear that the master knew, or by the exercise of reasonable diligence should have known, that the servant was incompetent.³

1422. There must be some evidence tending to show that the master, or his agent, in selecting an employee, had reason to know of his incompetency, or failed to make such inquiries as prudence required when he was employed, or retained him after his incompetency or unfitness became obvious.⁴

1423. Where the injury to an employee was alleged to be due to the unfitness of the engineer in charge of the defendant's hoisting apparatus, and there was no evidence as to the care or want of it exercised in the employment of such engineer, or that he was not in fact competent at the time he was employed, it was said: In such case the law presumes that the employer exercised due care in the employment of such servant. If thereafter, and during the course of his employment, he became incompetent, careless or so inattentive to his duties as to render him an unsuitable person to

¹ St. Louis Press-Brick Co. v. Kenyon, 57 Ill. App. 640.

² Roblin v. K. C., St. J. & C. B. R. Co., 119 Mo. 476; Wright v. N. Y. C. R. Co., 25 N. Y. 562; Reiser v. Pennsylvania Co., 152 Pa. St. 38; Ohio & M. R. Co. v. Dunn, 188 Ind. 18, 36 N. E. 702; Latremouille v. Railway Co., 63 Vt. 336, 22 Atl. 656;

Mayor, etc. of Baltimore v. War, 77 Md. 593, 27 Atl. 85; Southern Cotton Seed Oil Co. v. Devond (Tex.), 25 S. W. 43.

³ Reiser v. Pennsylvania Co., 152 Pa. St. 38.

⁴ Lee v. Detroit Bridge & Iron Works, 62 Mo. 565.

be retained in such employment, the burden was on the plaintiff to show this fact, and further to show that the defendant company either had actual notice of such subsequently acquired habits of carelessness or inattention on his part, or they were so marked or notorious that knowledge thereof would have come to the defendant had it given proper attention to its duties.¹

1424. To establish negligence not only the incompetency must be shown, but it must be shown that the defendant failed to exercise proper care or diligence to ascertain the servant's qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of the defendant or to some officer or agent of the defendant having power to remove him.²

1425. Notice of the incompetency of a servant or of acts which render him incompetent must be brought home to the employer, or proof given that he was ignorant of the same through his own negligence and want of care. In other words, it must be shown that the master either knew or ought to have known of the fact of incompetency. Personal negligence is the gist of the action.³

1426. Where the injury is occasioned by the incompetency and carelessness of a vice-principal, the master is liable whether he knew of such incompetency or not, provided the servant did not have knowledge thereof.⁴

1427. Where a finding in substance was that the defendant had knowledge of the incompetency of a fellow-servant, but did not state how long prior to the accident such knowledge was received, it was held that a verdict for the plaintiff could not be upheld.⁵

¹ *McCharles v. Horn Silver M. & S. Co.*, 10 Utah, 470, 37 Pac. 733.

² *Wabash R. Co. v. McDaniels*, 107 U. S. 454.

³ *Wright v. N. Y. C. R. Co.*, 25 N. Y. 562; *Wabash R. Co. v. McDaniels*, 107 U. S. 454.

⁴ *McDermott v. H. & St. J. R. Co.*, 87 Mo. 285.

⁵ *Louisville, N. A. & C. R. Co. v. Breedlove*, 10 Ind. App. 657, 38 N. E. 357; *Railway Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

1428. Although it appears that omissions of duty such as caused the injury have been habitual for some time prior, unless the master has actual notice of the omission, or unless the negligence is such as to leave traces or evidence of it in the work itself which could be seen or discovered by another, or unless the delinquencies were frequently displayed under the observation of some officer or foreman who represented the corporation, and who had power to discharge the negligent employee, the law will not imply notice to the master so as to charge him with negligence under all circumstances, simply from the lapse of a certain time since the employee so began to neglect his duties.

This was held where a switchman testified he had habitually violated the rule regarding the guarding of switches for four months.¹

1429. It is incumbent upon a servant who seeks to recover from the master for the carelessness of a fellow-servant to prove not only that the fellow-servant was in fact careless, but also that the master had knowledge of such carelessness or was negligent either in the selection or retention of such servant. There is no presumption that a fellow-servant is incompetent or careless. The admission of a foreman that the servant was careless and his carelessness was known to the defendant some time before the accident occurred is not competent to be proved nor binding upon the principal. The injury complained of was occasioned by the careless act of a fellow-servant in operating an elevator.²

1429a. The fact that the plaintiff told one of the defendant's officers that the employee in charge of the boiler was incompetent is not sufficient to show that he was in fact incompetent.³

1429b. Where it appears that due care was exercised in the selection of an employee, another employee cannot re-

¹ *Cameron v. N. Y. C. & H. R. R. Co.*, 145 N. Y. 400.

³ *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228.

² *Beasley v. S. J. Fruit Packing Co.*, 92 Cal. 388.

cover for injuries sustained by reason of the former's incompetency, unless he shows that such employee was in fact incompetent and that the defendant had knowledge thereof, or that his reputation was such that the defendant would be presumed to have such knowledge.¹

1430. It is not necessary that the evidence of a servant's incompetency should be brought to the personal knowledge of the master, but if it continues for such a length of time as that a careful supervision of its business ought to bring it to his knowledge, he is chargeable with notice of its existence.

This was said where it appeared that engineers in the employment of a railroad company frequently permitted their engines to remain stationary upon the main tracks in violation of its rules.²

1431. Where a complaint alleged that the plaintiff was engaged as a stevedore by the defendant, and while engaged in unloading one of its vessels was injured by falling through a hatchway negligently left open, it was held that the complaint stated a cause of action. It was said: If it had appeared that the negligence was that of the mate, and it were conceded that such mate was a co-employee, it would still be incumbent on the defendant to show affirmatively that the mate was a competent person for the position and that the defendant had furnished all necessary appliances to protect the hatchway. These are defensive facts, and there is no presumption of the existence of either of them in the absence of affirmative proof.³

D. When the Presumption of Diligence May be Overcome.

1432. Where the claim was that a railroad company was negligent in the employment of a night-operator, it was held competent for the plaintiff to show the operator's entire

¹ *Gier v. Los Angeles Con. E. R. Co.*, 108 Cal. 129; *Evansville & T. H. R. Co. v. Tohill*, 143 Ind. 49.

² *Whittaker, Adm'x, v. D. & H. C. Co.*, 126 N. Y. 544.

³ *Haley v. Western Transit Co.*, 76 Wis. 344.

record as such, whether the facts were actually known to the defendant or not, because, if they were facts of such a character that the defendant might by reasonable diligence have known them (which was a question for the jury), then it ought to have known them. Therefore it was competent to show what his experience had been with other railroad companies, because it was for the jury to say whether such facts might not have been known by the defendant had it made proper inquiry.¹

1433. It seems to have been held that the mere fact that a servant was incompetent by reason of slight deafness was sufficient to charge the master, as no reference is made in the opinion as to the negligence of the master in not ascertaining the fact. In fact, the charge of the court, which was approved, was to the effect that the servant was incompetent for such cause, and the plaintiff was entitled to recover.²

1434. Where a railroad company placed upon one of its yard engines, as engineer, an employee who had worked in the capacity of a track-repairer, upon his own recommendation as to fitness, and he had no experience in the business of running engines, and the plaintiff was injured by reason of his incompetency in fact, it was held that the company was chargeable with negligence in the employment and retention of an incompetent servant.³

1435. Where the proof showed that a conductor's experience consisted of his service as such for the six weeks next preceding the accident, during two of which he was suspended for neglect or improper performance of duty, and that the assistant superintendent, during the suspension, refused to give him a letter of recommendation, it was held that this was sufficient to justify a jury in finding the employer guilty of a want of proper care in the retention of an incompetent servant.⁴

¹ *Baltimore & O. R. Co. v. Camp*, 65 Fed. 952 (C. C. A.).

² *New York & T. S. S. Co. v. Anderson*, 50 Fed. 462 (C. C. A.).

³ *United States Rolling-Stock Co. v. Wilder*, 116 Ill. 100, 5 N. E. 92.

⁴ *Neilon v. K. C., St. J. & C. B. R. Co.*, 85 Mo. 599.

1436. Where a servant seeks to charge his master for negligence in employing an unfit fellow-servant, through whose unfitness the former servant is injured, we think the proper rule of proof to be that, when the unfitness is shown to have existed at the time of the employment, a *prima facie* case of negligence is made out against the master, and the burden is upon him to disprove negligence.¹

1437. Where it appears by direct evidence that a conductor is a man of intemperate habits, it casts upon the defendant the burden of proving that he was not intoxicated at the time and had used proper care. It is certainly incumbent upon railroad companies to employ none but sober men on their roads. Where a habit of intoxication is shown, it raises, in the case of an accident, a presumption of negligence which should stand until rebutted.²

1438. Mere proof that the reputation of a servant is so notorious as to his drinking habits that the defendant must be charged with knowledge of it is not sufficient when there is no evidence that he was intoxicated at the time of the accident.³

1439. It was assumed that an employee, whose experience had been that of a messenger, car-checker and train-master's clerk, was incompetent to perform the duties of yard-master. It was said: In the absence of any evidence as to the exercise of any care in his selection, proof that a servant, who has been in the service but two or three weeks, was incompetent when employed, need not be supplemented by proof of the company's knowledge of his incompetency. The presumption that the company had done its duty is overcome by proof that the servant was incompetent when employed. Notice is required when a servant, competent when employed, becomes incompetent, but not when the incompetency existed at the time.⁴

¹ *Crandall v. McIlrath*, 24 Minn. 127.

³ *Cosgrove v. Pitman et al.*, 103 Cal. 268, 37 Pac. 232.

² *Pennsylvania R. Co. v. Book*, 57 Pa. St. 339; *Huntingdon, etc. B. C. Co. v. Decker*, 82 Pa. St. 119.

⁴ *Lee v. Mich. Cent. R. Co.*, 87 Mich. 574, 49 N. W. 909.

1440. If a railroad engineer is addicted to the habitual use of intoxicating liquors to such excess that his intoxicated condition is observed by employees coming in contact with him for a period covering several months' time before an injury to an employee, caused by reason of his intoxication, and if by inquiry the officers of the company, during that time, would have discovered his habits, the omission to make inquiries would be negligence, as culpable as if they had employed a notoriously incompetent engineer without inquiry, and they would be liable, though they had not actual notice.¹

1441. Where the officers of a railroad company have had their attention called to the intemperate habits of an employee, it is their duty to make careful and frequent investigations as to the fact, if they retain him in their service. And if a servant has been repeatedly guilty of carelessness or incompetency, it becomes a question for the jury whether the master knew of it, or would have known of it had he exercised ordinary care.²

1442. It was held competent to show what a telegraph operator's experience had been in other companies, whether the facts were actually known to the defendant company or not, because if they were facts of such a character that the defendant company might by reasonable diligence have known them (which was a question for the jury), then it ought to have known them.³

1443. If the servant's general reputation before employment is so notorious as to unfitness as that it must have been known to the master but for his (the master's) negligence in not informing himself; if he could have been ignorant of it only because he failed to make investigation, then it is obvious that he has not used the care and caution which the law demands of him in selecting his employees; hence

¹ *Hilts v. C. & G. T. R. Co.*, 55 Mich. 437, 21 N. W. 878.

³ *Balt. & Ohio R. Co. v. Camp*, 65 Fed. 952.

² *Michigan Central R. Co. v. Gilbert*, 46 Mich. 176.

the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation for unfitness on the master's part is not shown.¹

1444. Where a young man applied for a position as a brakeman, to a general train dispatcher, who informed him that if he went to a place where it was the custom of the company to have extra men to supply the place of those who were sick or temporarily absent he might get a job, which he did, and was placed on the books as an extra, and it appeared that his experience consisted of two or three trips over the road; that he was not familiar with the rules and duties pertaining to the flagging of trains, and that he was selected by a conductor for such purpose and through ignorance the duty was improperly performed, whereby a collision resulted, it was held that it thus appeared that no effort was made to ascertain his experience or qualifications for the very responsible position of brakeman, and this was sufficient at least to shift the burden upon the defendant to show what diligence had in fact been used.²

E. Knowledge by Agent or Servant, when Chargeable to the Master.

1445. It is not the company, but their officer having charge of the department of the business relating to the employment of servants, who is expected to use ordinary care in the employment of servants. His carelessness in this respect is theirs and his knowledge is theirs. It was held error to reject evidence tending to show that the superintendent of a railroad company did not have knowledge that a conductor was a careless officer.³

1446. Notice of the incompetency of a fellow-servant must be had by one who has authority in the premises to bind the

¹ Norfolk & Western R. Co. v. Hoover, 79 Md. 253.

² Mann v. Prest. etc. D. & H. Canal Co., 91 N. Y. 495.

For other cases, see REPUTATION. See, also, SPECIFIC ACTS.

³ Frazier v. Pennsylvania R. Co., 38 Pa. St. 104; Couch v. Watson Coal Co., 46 Iowa, 17.

master. Hence, it was held that notice of the incompetency of a telegraph operator given to the chief train dispatcher of a railroad company was not sufficient to charge the company, when it appeared the dispatcher had no power to employ or discharge operators.¹

1446a. Knowledge of the incompetency of a servant need not be brought to the superior officers of a company retaining him in its service. It is sufficient to charge the company that such knowledge is possessed by such inferior officers as have supervision of his work and have the authority to suspend him temporarily for such incompetency, though the authority to discharge rests in others.²

1447. A railroad company employed a competent and skilful agent whose duty it was to employ men for a particular department of its service. The agent hired a foreman who was competent at the time, but subsequently acquired habits of intoxication which rendered him at times incompetent. This was known to the employee who was thereafter injured by the alleged incompetency of such foreman, and also to the agent who employed him. Such foreman directed two unskilled men to construct a scaffold, which they did, but by reason of the selection by them of improper and insufficient materials it fell while the plaintiff, an employee, was working upon the same, causing him injury. It was held that it was negligence chargeable to the master in retaining such foreman in its employ after knowledge by its agent of his habits of intoxication.³

1452. It was said that a railroad company was negligent in permitting its order forbidding firemen to handle engines to be violated by engineers, and retaining such of the latter in its employ after knowledge of their practice of thus abandoning engines, when such practice led to the placing of an engine in the hands of a careless and incompetent fire-

¹ Reiser v. Pennsylvania Co., 152 Pa. St. 38.

³ Laning v. N. Y. C. R. Co., 49 N. Y. 521.

² Balt. & Ohio R. Co. v. Henthorne, 73 Fed. 634.

man, whereby injury resulted to an employee. Notice to the master-mechanic of the road, whose duty was to employ engineers and firemen, of such practice was held chargeable to the company.¹

1453. Knowledge by a person in charge of the work in a quarry of the intemperate habits of the foreman was imputed to the company.²

1454. The fact that the foreman of defendant's round-house, whose duty it was to look after the engines and engineers and make reports to his superior, had heard that an engineer was drinking too much, was held to be sufficient evidence from which the jury might conclude that the company knew of his drinking habits, where such habit existed as matter of fact.³

1455. It was said that when an employee is injured by the negligent act of another servant, resulting from the latter's intoxication, and the employer knew of his intemperate habits and the plaintiff did not, the employer is liable for the injury; and it is immaterial whether the servant causing the injury was a fellow-servant of the one injured or his superior. Hence, when it was shown that a laborer in a quarry was injured while holding a wedge which was struck a violent and unnecessary blow by another servant at the direction of a foreman who was intoxicated at the time and who had formed the habit of intoxication which was known to the person who had control of the work, it was held that the master was liable, upon the ground of retaining in his employ an incompetent servant with knowledge of his unfitness.⁴

1456. Where a car-repairer while at work in a railroad yard was injured in a collision caused by the negligent misplacing of a switch by a switchman who was drunk at the time, it was held that evidence that the switchman had been

¹ *Ohio & Mississippi R. Co. v. Col-larn*, 73 Ind. 261.

² *Maxwell v. H. & St. J. R. Co.*, 85 Mo. 95.

³ *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475.

⁴ *Maxwell v. H. & St. J. R. Co.*, 85 Mo. 95.

drunk some weeks before and in that condition had caused a similar accident was competent, it appearing that the circumstances had been reported to defendant's foreman, who had authority to employ and discharge men.¹

1457. It was said that knowledge by the general agent of the defendant of the unfitness of the captain of a tug for his position will be imputed to the defendant.²

1458. Where it was alleged that the defendant had knowledge of the unfitness of a dumper in a mine for the position, his duties among others being to signal the engineer to start the hoisting machinery, and at the time in question he gave such signal without receiving a signal from below, and such knowledge on the part of the defendant was sought to be proven by the testimony of witnesses that on several occasions before, the elevator had been moved without signal from below, which was known to the pit-boss, and it appeared that the pit-boss had no authority over such dumper or men working at the top of the mine, it was held there was no evidence that the defendant had notice that the dumper employed at the time of the accident was habitually negligent or incompetent.³

F. *Incompetency, Evidence of.*

1. Incapacity.

1459. It was said that if an employer was incompetent to manage the erection of a building, and did not employ a skilful foreman or carpenter, that a proper question was thus presented for consideration by the jury as to the defendant's negligence. This was said where the defendant, in building a low building for use as a shop, employed men without experience as mechanics, and a temporary scaffold erected by some of them proved insufficient by reason of the selection of a cross-grained and knotty board.⁴

¹ Wabash & Western R. Co. v. Brow, 65 Fed. 941 (C. C. A.).

² Acme Coal Min. Co. v. McIver, 5 Colo. App. 267, 38 Pac. 596.

³ Baltimore Elevator Co. v. Neal, 65 Md. 439.

⁴ Haworth v. Seevers Mfg. Co., 87 Iowa, 765.

1460. Where a conductor of a freight train was placed in charge of a wild train running upon telegraphic orders, and he misunderstood an order or was forgetful of it, whereby a collision occurred, and it appeared that he had been a brakeman for many years and was promoted to be a conductor of a freight train less than a month before the accident, it was said: The evidence was overwhelming as to his competency for either of these positions, yet there was sufficient to sustain a finding that he was not competent to act as a conductor of a wild train, and that the company was negligent in selecting him for such service.

Some question appeared as to mental qualifications — lack of quick apprehension to understand orders of such a character, in the manner usually given.¹

1461. It was said, where a jury were permitted to consider the appearance and conduct of an employee upon the stand, who was a witness, that it could not be said as a matter of law that his appearance and conduct in the presence of the jury, in addition to other evidence relating to the manner in which he performed his duties, might not be legally sufficient to satisfy them that he was an incompetent person.²

1462. Subsequently, however, it was held that a jury could not be permitted to determine from the appearance of an engineer upon the stand that he was in fact incompetent. It was said that the case of *Keith v. New Haven & Northampton Co.*, 140 Mass. 175, only decided that with other evidence of incompetency the appearance and conduct of the party before the jury might be considered.³

1463. In an action by a minor eighteen years of age for injuries received while employed in defendant's factory, an instruction to the effect that the jury might consider the appearance of the plaintiff, as he had been exhibited before them on the witness stand, in determining the question of

¹ *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450.

³ *Peaslee v. Fitchburg R. Co.*, 153 Mass. 155.

² *Keith v. New Haven & Northampton Co.*, 140 Mass. 175.

his intelligence and capacity to apprehend and avoid the dangers incident to his employment, was held not to be erroneous.¹

1463a. The statement of a witness that a brakeman was slow and lazy, where it appeared that he was careful and competent, does not sustain an allegation of incompetency. To the argument of counsel that the jury saw the alleged offending servant, and upon his face and in his manner could see carelessness, it was said: If the jury undertook to decide that he was an unfit person to be employed as brakeman on account of what they saw, or supposed they saw, or could read in his face or manner while testifying before them as a witness, they did fall into a very grave error; as well might a jury find a man guilty of murder because, in their opinion, they could see guilt in his face. The law does not recognize physiognomy as an art or science sufficiently reliable to found a verdict upon, even against a railroad corporation.²

1463b. The mere fact that a superintendent engaged in the work of blasting rock had not had experience in the use of dynamite for blasting is not sufficient to show incompetency, where he testified he knew how it ought to be done.³

2. Intoxication.

1464. Habitual intemperance of a conductor is sufficient to establish his incompetency as a matter of fact.⁴

1465. Where it appears that an engineer is a habitual drinker and seldom free from liquor, the jury have a right to find that he is unfit for the position, even in his sober moments.⁵

1466. Mere proof that the reputation of a servant is so notorious as to his drinking habits that the defendant must

¹ *Disotell v. The Henry Luther Co.*, 90 Wis. 635.

⁴ *Chicago & Alton R. Co. v. Sullivan*, 63 Ill. 293.

² *Corson v. Maine Central R. Co.*, 76 Me. 244.

⁵ *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475.

³ *O'Neil v. O'Leary*, 164 Mass. 387.

be charged with knowledge of it is not sufficient, where there is no evidence that he was intoxicated at the time of the accident. Nor will the mere reputation that the standing of such a servant was impaired by such habits, of which the master would be chargeable with knowledge, be sufficient to charge the master with liability for his acts, if in fact he did not have such habit of drinking. An engineer who occasionally takes a drink, or occasionally is under the influence of liquor, is not thereby to be presumed to be incapable of managing an engine, when he had not been drinking for a year prior thereto.¹

1467. It was held that evidence was proper tending to show that an engineer was habitually intoxicated and a reckless runner, as tending to show that at the time of the accident he handled his engine negligently; yet it is not proper to show that an engineer was reputed to be a reckless runner and in the habit of becoming intoxicated.²

1468. Where it appeared, by direct evidence, that a conductor was a man of intemperate habits, it casts upon the defendant the burden of proving that he was not intoxicated at the time and had used proper care. Where a habit of intoxication in a conductor is shown, it raises in the case of an accident a presumption of negligence, which stands until it is rebutted.³

1469. Where it was alleged that a conductor, by reason of his intemperate habits, was an unfit and unsuitable person for the position of conductor, and from the evidence it appeared the conductor had nothing to do with the giving of the order to detach the train which was the cause of the plaintiff's injury, it was said in reference to the proof: In the matter of the incompetency of the conductor, to authorize a recovery by the plaintiff he must establish not only the facts that Ray's habits were such as rendered him unfit for

¹ *Cosgrove v. Pitman et al.*, 103 Cal. 268, 37 Pac. 232.

² *Hobson v. Railway Co.* (Arizona), 11 Pac. 545.

³ *Pennsylvania R. Co. v. Book*,

57 Pa. St. 339; *Huntingdon, etc. R. Co. v. Decker*, 82 Pa. St. 119; *Huntingdon, etc. R. Co. v. Decker*, 84 Pa. St. 419.

the position of conductor, and that this was known or should have been known to the defendant receiver and was unknown to the plaintiff, but, in addition, plaintiff must show that by reason of his habits of intemperance Ray was guilty of the negligence complained of, and that such negligence was the proximate cause of the injury.¹

1470. Where the workmen testified that the foreman had previously been drunk at his work, and defendant's superintendent testified he had seen him drunk several times and did not state that it was not while he was at work, and the defendant testified that the foreman had worked for him eight or nine years, and that he had never seen him drunk while at work, though he had often been so when off duty, that he was always able to do his work, it was held that a finding that the foreman was incompetent and that the defendant was chargeable with knowledge of it was justified.²

3. Inexperience.

1471. Before putting an inexperienced employee in charge of dangerous machinery, it is the positive duty of the employer to instruct and qualify him for such new service. If he cannot perform that duty himself he must provide a competent instructor. Such a person represents the master and *pro hac* occupies the position of vice-principal.

The rule was applied where there was evidence tending to show that a young and inexperienced person, without instruction, was placed at work on a machine for riveting boilers, and from his want of skill injury was caused to a fellow-workman.³

1472. It is not negligence in a railroad company to employ a brakeman twenty-two years old who is physically and mentally qualified for the business, merely because he has not yet had experience therein.⁴

¹ Campbell et al. v. Wing, 5 Tex. App. 431, 24 S. W. 360.

² McPhee v. Scully, 163 Mass. 216, 39 N. E. 1007.

³ Lebbering v. Struthers, Wells & Co., 157 Pa. St. 312.

⁴ Gorman v. Minneapolis & St. Louis R. Co., 78 Iowa, 509.

1473. A railroad company need not inquire into the experience of a section-hand engaged in loading ties on a hand-car, or give him special instructions, if he is mentally and physically competent to do such work. A fellow-servant has no redress against the master for injuries resulting from such other's negligence.¹

1474. Where a switchman neglected to close a switch, he being engaged at the time in conversation with another, and as a result a train was thrown from the track and the fireman killed; and it appeared he had been in the defendant's employ for seven years, until three months before the accident, as baggageman at the station, occasionally acting as switchman, and that he had performed the duties of switchman for such three months, it was held that the question of his competency must relate to the time of the injury, and as he had performed the duties of switchman for three months without fault or neglect, and was a man of ordinary intelligence, it appeared that he was clearly competent to perform those duties. That his failure to close the switch did not arise from inability to perform the duties, but was the result of inattention and carelessness; that therefore the injury was caused by the negligence of a co-servant, for which the defendant was not liable.²

1475. Where a railroad company gave permission to an engineer to allow a fireman to act as an engineer when he deemed him competent, and such engineer permitted such fireman, when he had but nineteen days' experience as a fireman, to handle the engine at a given place, and as a result of the negligent and unskilful manner in which he operated the same the conductor of the train was injured, it was held that the company was liable, on the ground that the act of the engineer was imputable to the company.³

¹ *Timm v. Mich. Cent. R. Co.*, 98 Mich. 226, 57 N. W. 116.

³ *Harper v. Ind. & St. L. R. Co.*, 47 Mo. 568.

² *Harvey v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 481.

1476. Where the alleged omission of duty was that the person in charge of a switch-engine did not slow up the train as it approached the car which the plaintiff (a brakeman) was attempting to couple, and thereby the plaintiff received injury, and it was also alleged that such injury was the result of the incompetency of such person acting as engineer, and it appeared he had for a long time been a fireman and occasionally performed the duties of engineer, that firemen are often qualified to perform such duties, especially in making up trains, which requires no special skill, it was held that a verdict should have been directed for the defendant. It was said: The circumstances do not establish that the fireman did not, when thus assigned to duty as an engineer, possess the requisite skill and experience for the proper discharge of that duty. No position affords better opportunities to learn locomotive engineering than that of a fireman. Engineers like those called to other positions of responsibility must have their early experiences. Railway companies could not long operate if only long-experienced engineers could be employed without liability for negligence, and opportunities would be denied to the beginner, however intelligent, industrious, apt and observing. The case of *Railway Co. v. Guyton*, 115 Ind. 450, is distinguished in this, that the service of operating a wild train was held to have required a conductor of more than ordinary skill, and there was some testimony as to his ability and capacity to interpret and understand the time-card.¹

1477. Where the petition alleged that the engineer in charge of an engine was incompetent, and that proper care was not exercised in his selection, and it appeared he was an old fireman; that the usual way for fitting a person for the possession of engineer is for him to serve as fireman for two years; that he was promoted to the position of engineer on the 1st day of December, 1881, and the accident occurred on the 19th day of such month, it was held that the master mechanic who employed him had reason to think he had

¹ *Ohio & M. R. Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702.

sufficient skill and experience to fit him for the position, and that the evidence did not warrant the verdict for the plaintiff.¹

1478. Where, at the time of injury to a brakeman while engaged in coupling cars, the switch-engine was in charge of the yard foreman, who was a machinist and not a regular engineer, it was said: If this rendered him incompetent and the plaintiff knew it, he would be held to have assumed the risk. If he was not qualified to handle the engine and the plaintiff did not know it, no recovery could be had except for the foreman's negligence, and if he handled the engine as carefully as an engineer of ordinary prudence would have done, then the plaintiff would not be entitled to recover.²

1479. Where, at the time of injury to a switchman while engaged in coupling cars, the engine was being operated by the fireman but under the immediate direction of the engineer, and it appeared such fireman had twenty months' experience as such and frequently handled the engine, it was held that there was no evidence that the fireman was unfit to handle the engine, or that the engineer was negligent in allowing him to do so under his direction, and a verdict should have been directed for the defendant.³

1480. Where an engineer, claimed to be incompetent, had had over four years' experience as fireman and had made several trips over the road as engineer before the accident in question, and it appeared that from three to five years' service as fireman was the time usually required before promotion to the position as engineer, and that at the time of his employment as such he was thoroughly examined as to the duties of such position, it was held that his competency appeared.⁴

¹ *Texas & N. O. R. Co. v. Berry*, Schwabbe, 1 Tex. App. 573, 21 S. W. 67 Tex. 238, 5 S. W. 817; *East Tennessee, V. & G. R. Co. v. McKeney* (Tenn.), 1 S. W. 500.

³ *Thompson v. Lake Shore & M. S. R. Co.*, 84 Mich. 281.

² *Gulf, C. & S. F. R. Co. v.* ⁴ *Roblin v. Kan. City, St. J. & C. B. R. Co.*, 119 Mo. 476, 24 S. W. 1011.

1481. Where the ground for recovery by an employee who was injured was that a fireman alleged to be incompetent was allowed to be in charge of the engine, and it appeared that, while he was coupling cars on a siding at the rear of the train with twenty cars, the train moved slowly back until within about six feet of the car to be attached, when the train or hind car suddenly came back, catching his hand, it was said: In order to establish the incompetency of such fireman the plaintiff must prove (1) that the fireman was so inexperienced in the management of an engine that it was not an exercise of ordinary care to place him in charge thereof, he not being reasonably safe and fit for the employment; (2) that he was guilty of mismanagement of the engine by reason of his inexperience and unskilfulness; (3) that such mismanagement was the proximate cause of the plaintiff's injury.

The evidence introduced by the plaintiff was (1) the failure of the fireman to respond to certain signals at a station; (2) the testimony of the conductor that the fireman was not known and recognized to be a skilled engineer; (3) and the accident itself. It was held that this proof was insufficient.

It was further said: If the accident happened from the negligence and not the incompetency of the fireman, the defendant is not liable; and that the mere fact of the accelerated speed of the cars under the circumstances could not be attributed solely to incompetency.¹

1482. Where, at the time of injury to a brakeman engaged in coupling cars, the engine was in charge of a fireman who had not been declared competent to handle an engine as required by a rule, and it appeared that when the brakeman went in to couple the cars they were moving at about two miles an hour, and at the time of injury the speed had been increased to five miles an hour, it was held that a motion for a peremptory instruction in behalf of the defendant was properly denied. There was involved the question,

¹ *Core v. Ohio River R. Co.*, 38 W. Va. 456, 18 S. E. 596.

however, whether such fireman was not a superior to the plaintiff, so that the company was liable for his negligence.¹

1483. Where the road-master of a railroad company was injured as a result of a train being run into a washout after a heavy rain, and it appeared the train was sent out to assist in repairing the track, with a person in charge of the engine who was competent to perform such duties, but who was not familiar with the road, and that the accident was the result of such want of familiarity, it was held that the evidence was such as to justify a verdict for the plaintiff on the ground that the engineer, though otherwise competent, was incompetent for the particular duty required on account of his lack of familiarity with the road.²

4. Youth.

1484. Where the offending servant was a telegraph operator a little over seventeen years of age with more than a year's experience, and who prior to the mistake in question had discharged his duties satisfactorily and intelligently, it was said: We think under the circumstances the jury could not be permitted to infer that such servant was incompetent in fact, from his age only, or that the company was negligent in employing him, or to speculate whether, if the operator had been a man of mature years or judgment, he would have been less likely to have committed the mistake.

The mistake referred to related to holding trains under telegraphic orders.³

1485. A jury were permitted to determine as to the competency of a young man seventeen years old as an operator from his limited experience as such. The accident was the result of his being asleep when a train passed his station. Being ignorant that it had passed, he misled the train dispatcher as to where it was at a particular hour of the night.⁴

¹ Greer v. L. & N. R. Co., 94 Ky. 169, 21 S. W. 649.

³ Sutherland v. Troy & Boston R. Co., 125 N. Y. 737.

² Missouri Pacific R. Co. v. Patton (Tex.), 25 S. W. 339.

⁴ Wabash Railway Co. v. McDaniels, 107 U. S. 454.

1486. The presumption is that a boy under the age of fourteen years is not competent to perform duties involving the personal safety of others and requiring the exercise of a good degree of care and watchfulness, and in an action for injuries resulting to others from the negligence of a boy so employed, the burden is upon the employer to show that he was in fact competent.

This was said where a boy less than fourteen years old was employed to signal the engineer when buckets of coal were filled in the hold of a vessel so as to be hoisted to the dock and the boy gave a signal prematurely, whereby the hand of one of the men at work in the hold of the vessel was torn and lacerated by a hook at the end of the cable.¹

1487. Where the claim was that a boy about fourteen years old was incompetent by reason of his age to perform the duties to which he was assigned, that of giving signals to an engineer when to raise or lower a weighty body by means of a derrick from a quarry, it was held that, as the employment called for no skill or judgment and the work was usually performed by boys, there was nothing to show that the boy was incompetent. It was further held that the doing of such work by boys was a risk incident to the employment and one assumed by other employees.²

1488. Where it was usual and customary in mines to employ boys from twelve to fourteen years old as trappers, and a boy over fourteen years of age with considerable experience was so employed, from whose alleged neglect an injury was occasioned a fellow-servant, it was held that the defendant was not guilty of negligence in employing the boy to do the work.³

5. Repeated or Habitual Acts.

1489. Where a railroad company permitted its employees to habitually disregard the safeguards provided to insure

¹ *Molaski v. Ohio Coal Co.*, 86 Wis. 220. See INSTRUCTION AND WARNING — MINORS.

² *Kansas & T. Coal Co. v. Brownlee* (Tex.), 31 S. W. 453. See INSTRUCTION AND WARNING, 2758 et seq.

³ *Rickert v. Stephens et al.*, 133 Pa. St. 538.

the safe running of trains, this was a neglect of duty which the company owed its other employees, as much as permitting the use of defective machinery. Hence it was held the company was negligent in retaining in its employ a switchman who habitually disregarded the rules of the company as to locking switches and remaining at his post until trains had passed, it appearing the company had knowledge of such neglect or was chargeable with such knowledge.¹

1490. Where the evidence tended to show that an engineer had by his conduct frequently shown his negligence, recklessness and unfitness for the place; that complaints had at different times been made to the representatives of the company at the local point (being the head of a division); that notwithstanding these complaints he had been retained in the service except at short intervals, when he had been discharged for misconduct, and that an injury to a brakeman was caused by the sudden and reckless manner in which, without warning or necessity, he reversed his engine, whereby such brakeman was thrown from the top of a car upon which he was standing, it was said that this made a case for the plaintiff unless overthrown by a successful defense.²

1491. Where an injury was occasioned an employee by the alleged negligence of an engineer in the matter of backing his engine, when the train had parted, and there was evidence, though conflicting, that such engineer was a habitual drinker; that he was often drunk when off duty and sometimes when on his engine, and it appeared that the foreman of the round-house admitted that sometime before the accident he heard complaint that such engineer was drinking too much, it was held that there was sufficient evidence from which the jury might conclude that the defendant knew of the drinking habits of such engineer and to support the verdict for the plaintiff.³

¹ *Coppins v. N. Y. C. & H. R. R. Co.*, 122 N. Y. 557.

³ *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475, 18 S. W. 1098.

² *Northern Pacific R. Co. v. Mares*, 123 U. S. 710.]

1492. While in Pennsylvania character for skill and care cannot be proved by special acts—only by general reputation (*Frazier v. Railway Co.*, 38 Pa. St. 104), yet it was held competent to show a conductor's accustomed disobedience of orders and his habitual drunkenness, and that these facts were known to the superintendent, as proof that a railroad company knowingly employed or retained in its service an unfit servant.¹

1493. Previous negligence on the part of a railroad engineer, if established, is not important unless he is also shown to have been negligent at the time of the injury for which suit is brought.²

6. Reputation.

1494. Character for skill and care cannot be proved by special acts—only by general reputation. Ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law only demands the ordinary.³

1495. General reputation of unfitness may be proven as tending to show knowledge on the part of the master of the servant's incompetency, or negligence in the act of selection or retention, in not making the proper inquiry where it was a plain duty to do so.⁴

1496. Where a switchman was intoxicated at the time of attempting to do the act which caused injury to another employee, and he had the reputation, when first employed by the defendant, in the community where he lived, of being a man of grossly intemperate habits and a habitual drunk-

¹ *Huntingdon & B. R. Co. v. Decker*, 82 Pa. St. 119; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 389.

² *Thompson v. Lake Shore & M. S. R. Co.*, 84 Mich. 281.

³ *Frazier v. Pennsylvania Co.*, 38 Pa. St. 104; *Cosgrove v. Pitman et al.*, 103 Cal. 268, 37 Pac. 232. See, however, *Stevens, Adm'x, v. Railway Co.*, 100 Cal. 554.

⁴ *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Mich. Cent. R. Co. v. Gilbert*, 46 Mich. 176; *Hatt v. Nay*, 144 Mass. 186; *Baulec v. N. Y. & H. R. Co.*, 59 N. Y. 356; *Lake Shore & M. S. R. Co. v. Stupak*, 123 Ind. 210; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 230.

ard, and was such in fact, it was held competent evidence to be submitted to the jury upon the question of defendant's knowingly, or in ignorance caused by their own negligence, employing a habitual drunkard as a switchman, and thereby occasioned the accident, though it would not appear they had actual knowledge of his faults prior to the accident.¹

1497. Where the contention was that a city had negligently employed an incompetent person to perform ordinary labor, and sought to prove such negligence by evidence that in the community where he lived he was generally reputed to be infirm in the sense of sight, of hearing, and deficient in physical strength, it was held such evidence was competent. It was said: The master is bound to use reasonable care in selecting his servants, and if a person is incompetent for the work he is employed to do, the fact that he is generally reputed in the community to lack those qualities which are necessary for the proper performance of the work, certainly has some tendency to show that the master would have found out that the servant was incompetent if proper means had been taken to ascertain the qualifications of the servant. We cannot say that it may not be a matter of common repute in a community that a man is physically weak and partially blind and deaf.²

1498. A question as to what a locomotive engineer's general reputation as to care and competency was is improper when it is not confined to his reputation among those persons engaged in the same kind of occupation, as the general public could not be acquainted with his reputation.³

1499. It was held that evidence was proper tending to show that an engineer was habitually intoxicated and a reckless runner, as tending to show that at the time of the accident he handled his engine negligently; yet it is not proper to show that an engineer was reputed to be a reckless runner and in the habit of becoming intoxicated.⁴

¹ *Gilman v. Eastern R. Corp.*, 10 Allen, 233; *Same Case*, 13 Allen, 433. ³ *Galveston, H. & S. A. R. Co. v. Davis*, 4 Tex. 468, 23 S. W. 301.

² *Monahan v. City of Worcester*, 150 Mass. 439. ⁴ *Hobson v. Railway Co.*, 11 Pac. 545 (Ariz.).

1500. Where there was evidence tending to show that an engineer was reckless, unsuited to the place, and that of this the officers of the company were informed, when he was last employed, over the protest of a train-master who gave information not only of his general reputation for carelessness, but of a wreck caused by him when formerly in the employment of the company, this was held sufficient to sustain a finding that the defendant negligently employed an incompetent servant. The negligent act which was held to be the proximate cause of the injury was that of temporarily leaving his engine while the train was stalled upon a grade, and going forward to another engine attached to the same train, and while thus momentarily absent, the fireman, who was inexperienced and without orders, in some manner started the engine.¹

1501. A general reputation regarding the incompetency of a servant is admissible on the ground that it furnishes some reason to believe that if the master had exercised due care he might have learned or heard of the incompetency. But the reputation of a fireman among a few workmen employed under him is not a general reputation. It is merely an opinion of a small number of men, of which there is no sufficient reason to suppose the master may be cognizant, or which he may be bound to know.²

1502. Where it was alleged that an employee's injuries were caused by the negligent act of an incompetent servant, a captain of a tug, it was said, quoting from another court: "When through the negligent act of a servant who was in an intoxicated condition, and when it is further shown that he was in the habit of drinking intoxicating liquors to excess, such habit extending over a period of nine months while in the defendant's employ, and no actual knowledge or notice had ever reached any superior officer, we think the jury may be justified in concluding from such evidence

¹Mexican Nat. R. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075.

²Driscoll v. City of Fall River, 163 Mass. 105, 39 N. E. 1003.

that the defendant was negligent in failing to learn of such habit and retaining the engineer in its employ."

It was held that evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master may of itself, where it is his imperative duty to know the fitness of his servant, and where inquiry would have led to such knowledge, be such negligence as to charge the master.¹

1503. Where the cause of an injury was attributable to the negligent conduct of a brakeman, and there was evidence that he had been drinking the night of the accident, and within thirty minutes prior thereto his breath showed unmistakable evidence of it, this was held sufficient to permit evidence as to the general reputation of such brakeman for sobriety for one or two years before the accident, as bearing upon the question of the care exercised by the master in employing, or in the retention of, such servant. It was said, however, that proof of his general reputation was immaterial, unless it appeared he was drunk at the time of the accident, or there was evidence from which it might be found, even though such general reputation was known to the master, for the plain reason that, if not drunk at the time, the injury was not occasioned by his neglect.²

1503a. Where it appears that proper care was exercised in the employment of a servant, mere proof of his reputation for recklessness and carelessness will not be sufficient to establish his incompetency. It still must be proved that he was in fact reckless and careless.³

1503b. Where there is some evidence tending to show that an accident was caused by the intoxication of the engineer, it is competent to prove the engineer's general reputation for drunkenness and his consequent incompetency, as bearing upon the question of knowledge by the company and its negligence in retaining him in its employ.⁴

¹ *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241.

² *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994.

³ *Gier v. Los Angeles Con. E. R. Co.*, 108 Cal. 129.

⁴ *Balt. & Ohio R. Co. v. Henthorne*, 73 Fed. 634.

1503c. The general reputation of an employee among his fellow-servants for incompetency is not sufficient to charge one of the latter, injured by the former's incompetency, with knowledge that he was in fact incompetent.¹

1503d. Yet such general reputation of an incompetent servant among his fellow-servants is sufficient to charge the master with knowledge of his incompetency.²

1504. Evidence of the general repute of a fellow-servant as a careful workman is incompetent.³

7. Specific Acts.

1505. A single act of forgetfulness or carelessness is insufficient to show unfitness in an employee.⁴

1506. An employee was injured by the act of a switchman in turning a switch through a mistake on his part as to the train which was approaching. In an action against the company it was claimed such switchman was retained in the service after he had shown himself unfitted for the position and unsafe to be trusted in it. This was sought to be sustained by proof of a similar act on a former occasion, of which the company had notice. It was held that it was insufficient either to show unfitness or incompetency of the servant or to charge the defendant with negligence in retaining him in the service. It was also held that when the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. This with the purpose of establishing his unfitness or incompetency in fact, but it cannot be used for the purpose of showing negligence on the particular occasion in question.⁵

¹ *Texas & Pacific R. Co. v. Johnson* (Tex.), 35 S. W. 1042.

² *Texas & Pacific R. Co. v. Johnson* (Tex.), 35 S. W. 1042.

³ *Malcolm v. Fuller*, 152 Mass. 160.

⁴ *Mich. Cent. R. Co. v. Dolan*, 32

Mich. 510; *Mich. Cent. R. Co. v. Gilbert*, 46 *Mich.* 176; *Peaslee v. Fitchburg R. Co.*, 152 *Mass.* 155.

⁵ *Baulec v. N. Y. & H. R. Co.*, 59 *N. Y.* 356.

1507. Proof of specific acts of negligence is not admissible as tending to show negligence at the time in question on the part of a servant, but only for the purpose of showing a want of proper care on the part of the master in the employment or retention of an incompetent servant, and notice on the part of the master of such incompetency.¹

1508. Specific acts of carelessness on the servant's part while engaged on the same job, and before the accident happened, cannot be shown. It was said: Because a servant may have been guilty of negligence on certain specific occasions, it by no means follows that he was negligent on the occasion in question or that he might not ordinarily be a careful and skilful workman and properly employed as such. The investigation of other individual acts on the servant's part would necessarily have a tendency to confuse the case by collateral inquiries, to protract it indefinitely, if these inquiries were properly made, and to mislead and distract the court and jury from the true issue.²

1508a. It is not competent, upon the issue of the competency of the superintendent of a mine, to show that parties other than the plaintiff had been injured in the mine while working under him as such.³

1509. Where liability for injuries received by an employee was claimed on the ground that the servant was incompetent and the employer was chargeable with knowledge thereof, and it appeared that the offending servant was employed as an engineer in operating an engine used in connection with the sinking of a shaft; that on the previous day the cage had fallen three times, and in falling on the day in question had caused the injury complained of, and that such engineer was employed on the recommendation of a citizen and a member of the city council who was an experienced locomotive engineer, it was held that the evidence was insufficient to sustain a recovery.

¹ *Pittsburg, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330. ³ *Buckalew v. Tenn. Coal, I. & R. Co. (Ala.)*, 20 So. 606.

² *Hatt v. Nay*, 144 Mass. 186.

It was said: Negligence and incompetency are not convertible terms, for the most competent may sometimes be negligent; and evidence of former acts of unskilfulness does not prove that the servant was negligent at the particular time, or, unless communicated to the master, that the master was negligent in retaining him. The former act of letting the cage fall, if through the engineer's negligence, did not prove him incompetent.

That as to the second proposition there was no evidence that the representative of the city was negligent in employing such engineer, in the absence of evidence that a prudent man would not have acted on such recommendations.¹

1509a. The mere fact that a fellow-servant was negligent, causing injury to another, is not sufficient to prove negligence on the part of the master in employing him.²

1510. The fact that the employee was negligent in performing the act does not show necessarily that he was incompetent or that the master was negligent in employing him. This was said where it was alleged that a foreman was negligent in preparing a certain cartridge in such a manner that it exploded, causing injury to one of the laborers.³

1511. A single act of negligence assuredly does not establish incompetency or by itself have any tendency to do so. If it were to be so regarded and thus furnish grounds for conjecture that such incompetency was known to the master, then all cases of damage by the negligence of fellow-servants may be allowed to be traced to the negligent appointment of incompetent subordinates. Such inferences would produce injustice, as the most careful and best qualified workmen in any branch of mechanism are liable to mistakes.⁴

1511a. Upon the question of the competency of a train-dispatcher who was permitted to run a regular train ahead

¹ Mayor, etc. City of Baltimore v. War, 77 Md. 593, 27 Atl. 85.

² Conrad v. Gray (Ala.), 19 So. 398.

³ Sullivan v. N. Y., N. H. & H. R. Co., 62 Conn. 209, 25 Atl. 711.

⁴ Lee v. Detroit Bridge & Iron Co., 62 Mo. 565.

of time, as an extra, the fact that he had run forty trains ahead of time in a year did not establish his incompetency.¹

1512. The doctrine above stated was applied where it was claimed that upon a prior occasion an engineer had run his train too fast. It was held that this was insufficient to charge the master with knowledge. It was said that, aside from statutory provisions, no rate of speed at which a train is run is, as a matter of law, negligence *per se*. Citing *Williams v. Railway Co.*, 74 Mo. 594.²

1513. Intemperance, sobriety and drunkenness are facts to be proved like other facts. Hence it was held that evidence of the reputation of an engineer as to his intemperate habits was inadmissible.³

1514. Negligence such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be habitual rather than occasional, or of such a character as renders it imprudent to retain him in service. A single exceptional act of negligence will not prove a servant to be incapable or negligent. If it were otherwise, no servant could be retained in service; for, as has truly been said, there is no person who has not at some time to some degree been negligent.⁴

1515. It was said that evidence that a railroad employee was passionate and excitable does not, of itself, show that he is unfit for the position of yard-master, nor does the mere fact that he had sent an engine upon the track when a coming train was overdue necessarily imply he was negligent. The train may have been delayed, of which fact he had knowledge.⁵

1516. The mere fact that an accident had before occurred while a servant alleged to be incompetent was in

¹ *Evansville & T. H. R. Co. v. Tohill*, 143 Ind. 49.

⁴ *Balt. Elevator Co. v. Neal*, 65 Md. 439.

² *Huffman v. C., R. I. & P. R. Co.*, 78 Mo. 50.

⁵ *Mich. Cent. R. Co. v. Gilbert*, 46 Mich. 176.

³ *Stevens, Adm'x, v. San Francisco & N. P. R. Co.*, 100 Cal. 554.

the service of the defendant in a different employment does not show any incapacity for another employment in the same service.¹

1517. Where a car-repairer in the employ of the defendant while at work in the defendant's yard was injured in a collision caused by the neglect of a switchman in misplacing a switch, who was drunk at the time, it was held that evidence showing that such switchman had been drunk some weeks before, and while in that condition had caused a similar accident, was competent, it appearing that the circumstances had been reported to defendant's foreman, who had authority to employ and discharge men.²

1518. Where the incompetency of a telegraph operator was alleged as the cause of an accident and consequent injury to an employee, it was held competent to show that on a former occasion he was suspended for going to sleep, thus stopping a fast train. This was most significant evidence upon the issue whether the company had been careless or not in his re-employment.³

1519. Where the evidence for the plaintiff tended to show that a brakeman had proved careless and incompetent on other occasions, but failed to show he was careless on the occasion in question, nor carelessness on the part of any one else, it was held that a verdict should have been directed for the defendant.⁴

1520. The California court, while admitting that there might be occasions where the circumstances were such that a single act of carelessness known to the employer might be sufficient to show his servant's incompetency and charge the master with negligence in retaining him in the employment, said: Yet the mere fact that upon one occasion an engineer had run a train without accident at a dangerous rate

¹ *Beasley v. S. J. Fruit Packing Co.*, 92 Cal. 388.

² *Wabash Western R. Co. v. Brow*, 65 Fed. 941.

³ *Balt. & Ohio R. Co. v. Camp*, 65 Fed. 952.

⁴ *Galveston, H. & S. A. R. Co. v. Faber (Tex.)*, 8 S. W. 64.

of speed is insufficient. It approves of what was said in *Baulec v. Railway Co.*, 59 N. Y. 363.¹

1521. The Iowa court, without defining its position upon the question whether proof of specific acts of negligence was competent to show the incompetency of a fellow-servant, held that such proof is competent to show that the master or his direct representative had knowledge of specific acts of negligence where they were committed in his presence. It was said: If the superintendent as a reasonably careful and prudent man must have had knowledge of these specific acts, then the defendant is bound thereby. The fact that he was discharged after the accident and afterwards employed as an engineer at another mine and then discharged has no tendency to prove that he was incompetent.²

1522. It seems to have been held that a single act of negligence on the part of a conductor, such as leaving a switch open, was conclusive evidence that he was an incompetent conductor, and that where the company had notice of such careless act and inattention, it was its duty to discharge him, and if it retained him in its employ thereafter and an injury was occasioned an employee by reason of a careless or negligent act of such conductor, the defendant was liable, upon the ground of having knowingly retained in its employ an incompetent servant.³

1523. It was said, however, in a later case: It is not to be tolerated that the law will pronounce a person who is shown to be qualified by years of efficient service, incompetent because of a single mistake or act of forgetfulness. The fact, however, cannot be disguised that a single act with the circumstances surrounding it, when the consequences are so overwhelming as the bringing of two trains of cars into collision, may tend very strongly to show the incompetency of the actor to perform the service to which he is assigned.⁴

¹ *Holland v. Southern Pac. R. Co.*, 100 Cal. 240.

² *Couch v. The Watson Coal Co.*, 46 Iowa, 17.

³ *Pittsburg, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294.

⁴ *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450. See, also, *Cook*

1524. It was held that the mere fact that a fireman, who was moving a switch-engine in a yard, did not stop it with promptness, was sufficient to justify a finding that he was in fact incompetent to handle the engine. Injury was caused to an employee of another road while standing on defendant's track. The statute was not applicable, nor was the question of the master's care in selecting the servant considered.¹

1525. Specific and isolated acts of negligence on the part of an employee, unless brought home to the knowledge of the master, are not admissible as reflecting on the question of the master's care.²

1525a. Former acts of carelessness or unskilfulness on the part of the captain of a tug furnish no legitimate ground of presumption that he was guilty of negligence or unskilfulness on the occasion when the plaintiff was injured.³

G. *Knowledge by Servant.*

1526. Where an employee knows of the incompetency of a fellow-servant and, notwithstanding, continues in the employment, he assumes the risk.⁴

1527. If an employee with full knowledge of the habitual and continued negligence of his employer or of his superior fellow-servant in some particular matter acquiesces therein and continues in the service without any objection or effort towards a correction of the neglect, he thereby waives his right against the employer and takes the risk upon himself.

v. St. L., I. M. & S. R. Co., 8 Mo. App. 573; McDermott v. H. & St. J. R. Co., 87 Mo. 285.

¹ McMarshall v. C., R. I. & P. R. Co., 80 Iowa, 757.

² Norfolk & Western R. Co. v. Hoover, 79 Md. 253.

³ Balt. Elevator Co. v. Neal, 65 Md. 439.

⁴ McDermott v. H. & St. J. R. Co., 87 Mo. 285; United States Rolling

Stock Co. v. Wilder, 116 Ill. 100; Davis v. Detroit & M. R. Co., 20 Mich. 105; Wright v. N. Y. Cent. R. Co., 25 N. Y. 562; Hatt v. Nay, 144 Mass. 186; Stafford v. C., B. & Q. R. Co., 114 Ill. 244; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104; Lake Shore & M. S. R. Co. v. Stupak, 108 Ind. 1; Lake Shore & M. S. R. Co. v. Knittal, 33 Ohio St. 468.

This rule was stated and applied where a railroad company through its agents in charge of a train were in the habit of making running or flying switches, and on one occasion a brakeman was injured.¹

1528. If the servant sustaining the injury through the unskilfulness, insufficiency in number or otherwise of his fellow-laborers have the same knowledge or means of knowledge of their unskilfulness or incompetency as his employer, he cannot sustain an action against the employer, but will be held to have assumed the risk.²

1529. The complaint must allege either that the master had not exercised ordinary care and prudence in the employment of the fellow-servant, or that he had retained him in his service after he had received notice that he was incompetent or negligent in the discharge of his duties. He must aver that at the time he entered the master's service he had no knowledge of his incompetency or negligent habits.³

1530. Where the complaint was that an employee was physically weak and infirm by reason of a chronic disease (bronchitis), and from association with him a servant who was injured by his alleged incapacity while engaged in removing an iron guard rail from a bridge had the same opportunity of knowing his physical ability to perform the labor, it was held that the injured servant could not recover.⁴

1531. In order to attach liability to a defendant who is the operator of a mine, for the negligence of a filler in the mine in not properly posting and propping the roof, the plaintiff, if a fellow-servant, must show that the defendant had knowledge before the accident of the incompetency of the filler to perform the duty of posting and propping, or

¹ Lake Shore & M. S. R. Co. v. Knittal, 33 Ohio St. 468.

² Wright v. N. Y. C. R. Co., 25 N. Y. 562.

³ Lake Shore & M. S. R. Co. v. Stupak, 108 Ind. 1.

⁴ Bonnett v. Galveston, H. & S. A. R. Co. (Tex.), 31 S. W. 525.

by the exercise of due care might have known it, and that he himself was ignorant of such incompetency, and could not by the exercise of ordinary diligence have learned it; and where by the plaintiff's evidence it is shown that he knew of the incompetency of his fellow-servant, if it existed, or, if an experienced miner, had equal opportunity with the company of knowing, and could have known by the use of ordinary care, and is also aware of the danger of working in a room insufficiently propped, and continued his work without complaint, such a case of contributory negligence is shown as will prevent a recovery.¹

1532. Where a plaintiff who charged that his injuries were due to the incompetency of an engineer in charge of the defendant's hoisting apparatus testified that prior to the accident he knew that this engineer was careless and reckless, and that he never made any complaint thereof to any officer or agent of the defendant company, or in fact to any one, but continued to expose himself to the dangers arising from such alleged recklessness and carelessness, it was held sufficient to preclude a recovery.²

1533. Where it appeared that an employee who was killed by the neglect of a fellow-servant charged to be incompetent knew of the specific prior acts of negligence on the part of such fellow-servant, whereby it was sought to charge the master with knowledge of his unfitness, it was held that this would preclude a recovery.³

1534. The inexperience and consequent incompetency of a fireman to properly handle an engine will not subject a railroad company to an action for personal injury resulting therefrom to another employee who, knowing of the inexperience of the fireman, made no objection to serving with him, while passing over a switch and entering a siding for the purpose of connecting the locomotive with cars thereon.

¹ Consolidated Coal & Mining Co. v. Clay's Adm'x, 51 Ohio St. 542, 38 N. E. 610.

² McCharles v. Horn Silver M. & S. Co., 10 Utah, 470, 37 Pac. 733.

³ Acme Coal Min. Co. v. McIver, 5 Colo. App. 267, 38 Pac. 596; Smith v. Sibley Mfg. Co., 85 Ga. 333, 11 S. E. 616.

Where a plaintiff admitted in his testimony that he knew of the fireman's inexperience, it was held that this put the ground of the action out of the case and the court should not have submitted it to the jury.¹

1535. If a workman knows that the foreman under whom he works is incompetent, but continues to work under him, making no complaint to the master, he must be held to have assumed the risk and hazard arising therefrom.²

1536. It was said in reference to a brakeman, if he knew the conductor was habitually careless and chose to continue in the service with him, and did not inform the company of his known acts and carelessness and refuse to serve with him, he can have no claim against the company for injuries suffered from further carelessness, even though the company did also know.³

1537. The duty of the master in relation to convicts was held to be the same as to free persons, and it was error to charge that if plaintiff voluntarily engaged in labor with such convicts he could not recover, since the defendant was bound to use reasonable care in the selection and retention of such servants and in ascertaining their competency before associating them with the plaintiff.⁴

1538. Where it was alleged that a fellow-servant was incompetent and habitually careless, and it also appeared that the plaintiff worked on the construction train when such servant was engineer for six weeks prior to receiving his injury, it was said: It cannot be doubted that the plaintiff knew or ought to have known of such engineer's habits long before the day on which he was injured, and must be held to have assumed the risk.⁵

¹ *Richmond & D.R. Co. v. Worley*, 92 Ga. 84, 18 S. E. 361.

² *Hatt v. Nay*, 144 Mass. 186; *Stafford v. C., B. & Q. R. Co.*, 114 Ill. 244.

³ *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104.

⁴ *Porter v. Waters-Allen Foundry & Mach. Co.*, 94 Tenn. 370, 29 S. W. 227.

⁵ *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1.

1539. Where it is sought to charge the employer with knowledge of a section foreman's incompetency by proof that on prior occasions such foreman was rash and reckless in the manner of operating and handling his hand-car upon the track in the face of approaching trains, it was said that if the plaintiff, who was one of the section crew, knew that such foreman was reckless and careless, and notwithstanding such knowledge continued the employment, he was not entitled to recover. It was held that where one knowing of the incompetency of a vice-principal continues in the employment, he assumes the risk to the same extent as if such vice-principal was merely a fellow-servant.¹

1540. Where a car inspector decided to repair a car upon a side-track and an employee was assigned to assist him, and the former was injured by a car being noiselessly switched against the car under which he was engaged in making repairs, such result being chargeable to the failure of such assistant to warn him; and it appeared that such helper had worked in the yard twenty years, and that the plaintiff had fourteen years' experience as a car repairer in that yard; and the court had charged in effect that the defendant would be liable for the injury if caused by the incompetency of such helper, although the plaintiff knew of his incompetency and received him without objection, it was said: It is well established that an employee assumes all dangers from the known incompetency or unskilfulness of a fellow-servant of which he does not complain or make known to his employer. It was held that a verdict should have been directed for the defendant.²

1541. Where the incompetency of a foreman was alleged and the evidence tended to support the charge, it was held that such question became immaterial where, by the pleading and testimony of the plaintiff, it appeared he had knowledge of his incompetency; that under such circumstances he assumed the risk. Nor could the plaintiff be heard to

¹McDermott v. H. & St. J. R. Co., 87 Mo. 285.

²Latremouille v. Bennington & R. R. Co., 63 Vt. 336, 22 Atl. 656.

claim that he relied upon the promise of the switchman who had charge of certain other switchmen in the capacity of foreman, to supply another foreman in place of the reckless one, where such switchman had no authority from the master to employ or discharge employees.¹

1542. Where the plaintiff knew or had ample capacity and opportunity to judge of his co-employee's incompetency or habits which might render him incompetent, it was held that he assumed the risk.²

1543. Where the contention was that that the defendant railroad company had retained in its employ an incompetent engineer whose reputation was that of a reckless runner, it was said: If he was notoriously incompetent or reckless, the conductor (the employee injured) enjoyed excellent opportunities to become acquainted with his reputation, and also whether that reputation was deserved. He was employed under him for six weeks, yet he made no complaint.³

1543a. The general reputation of an employee among his fellow-servants for incompetency is not sufficient to charge one of the latter, injured by the former's incompetency, with knowledge that he was in fact incompetent.⁴

1544. The law does not impose upon the servant the duty of investigating whether the master had exercised the proper diligence in selecting an employee. He may assume the master has discharged his duty in this respect, and until notice to the contrary is brought home to him he may safely act upon that presumption. The law only demands that he shall keep his eyes open to what is passing before him and avail himself of such information as may come to him regarding the skill and conduct of other employees, and if he finds that from their incompetency or other cause the hazards of his employment are increased he should notify the

¹Galveston, H. & S. A. R. Co. v. ³St. L., I. M. & S. R. Co. v. Mor-
Eckols, 7 Tex. App. 429, 26 S. W. gart's Adm'r, 45 Ark. 318.
1117.

²Kansas Pac. R. Co. v. Peavey, ⁴Texas & Pacific R. Co. v. John-
son (Tex.), 35 S. W. 1042.
34 Kan. 472, 8 Pac. 780.

master, and if he refuses to discharge such servants he has the alternative of quitting the service or of assuming the extra hazard if he continues the employment. On the part of the master it is negligence to retain the incompetent servant; on the other hand it is negligence for the complaining servant to continue the employment.¹

1545. It was said the trial court was right in refusing to instruct that if the plaintiff knew, or even had the opportunity of knowing, before his fall from the car, that the engineer was an unfit or unsafe man to run the engine, it was his duty absolutely to refuse to work with him any longer. The duty of the plaintiff, under such circumstances, is not determined by the single act of his knowledge of the danger he incurred by continuing to serve with an employee known by him to be an unfit and incompetent person. It was enough that it was qualified by saying "it might be negligence." Whether it was or not was for the jury to say from all the attending circumstances. A suitable judgment could only be reached by carefully weighing the probable consequences of both courses of conduct, and it might well happen that even at the risk of injury to himself, occasioned by the unskillfulness of his co-employee, the plaintiff might still reasonably be regarded as under a duty not suddenly and instantly to refuse to continue in the conduct of the business of the principal.²

1546. Where it appeared the agent had said he would have to discharge a foreman, who had acquired habits of intoxication, if he did not do better, it was held that it was a question for the jury whether the plaintiff was guilty of contributory negligence in continuing the employment after knowledge of the foreman's habits.³

1547. The Missouri court in some cases apply the doctrine applied by other courts where there has been a prom-

¹ United States Rolling Stock Co. v. Wilder, 116 Ill. 100, 5 N. E. 92. ³ Laning v. N. Y. C. R. Co., 49 N. Y. 521.

² Northern Pacific R. Co. v. Mares, 123 U. S. 710.

ise to remedy a defect, which in substance is that mere knowledge that an appliance is defective, and that risk is incurred in its use, will not, as matter of law, defeat the servant's action, where the danger is not such as to threaten immediate injury, or where it is reasonable to suppose the appliance may be safely used by the exercise of care and caution. The cases cited in note, among others, are illustrations of the application of this rule.¹

1548. Hence it was held that mere knowledge by a servant of the incompetency of a fellow-servant would not bar a recovery; but it is for the jury under all the circumstances to say whether the danger was so obvious that an ordinarily prudent man would refuse to work with him. It was said that fidelity to his employer demanded that he should not quit the service without giving it a reasonable opportunity to supply competent men in place of the strikers, and he might well have concluded that the engineer would learn the signals, and that it was not necessarily dangerous to work with him.²

1549. It was said by the North Carolina court that where an employee remains in the service of the master with full knowledge of the incompetency of a fellow-servant, he is denied recovery upon the ground of contributory negligence and not by reason of any risk assumed by reason of the contract of employment.³

1550. By continuing to work with an incompetent fellow-servant without notifying the master, one assumes the risk of injuries resulting from the incompetency.⁴

1551. A servant is not bound to ascertain at his peril whether the master has used reasonable care in the selection of those employed in the same branch of service, but is war-

¹ Hamilton v. Mining Co., 108 C. B. R. Co., 127 Mo. 658, 28 S. W. Mo. 364; Huhn v. Missouri Pac. 842.

R. Co., 92 Mo. 440; Soeder v. Railway Co., 100 Mo. 673; O'Mellia v. 97 N. C. 66.

Railway Co., 115 Mo. 205; Mahaney v. Railway Co., 108 Mo. 191. ⁴ St. Louis Press Brick Co. v. Kenyon, 57 Ill. App. 640.

² Francis v. Kansas City, St. J. &

ranted in assuming that his employer has performed his duty in that respect, and until notice is brought home to him may act on such assumption.¹

1552. In the absence of any knowledge or information putting him on inquiry, an employee has the right to assume that a fellow-employee is competent to perform the services for which he is employed.²

1553. Where, after notice that a fellow-servant was negligent, an employee remained in the employment, it was held he could not recover — that he assumed the risk.³

1554. Where the incompetency of a filler in a mine was the alleged ground for recovery, it was said: In order to attach liability to the company for the negligence of the filler, the plaintiff must show that the company had knowledge, before the accident, of the incompetency of the filler, or by the exercise of due care might have known of it, and that he was ignorant of such incompetency and could not by the exercise of due diligence have learned it. And where, by the plaintiff's evidence, it is shown that the deceased knew of the incompetency of his fellow-servant, if it existed, or, being an experienced miner, had equal opportunity with the company of knowing, and could have known by the exercise of ordinary care, and was aware, also, of the danger of working in a room insufficiently propped, and continued his work without complaint, such a case of contributory negligence is shown as will prevent a recovery.⁴

1555. A charge that if in the proper operation of railroads a reasonably careful and intelligent man can only become a skilful and competent yard brakeman by actual service as such, and a railroad has to employ inexperienced men in that service, a yard brakeman assumed the risk of the inexperience of his fellows, is erroneous, since the servant has the right to assume that his fellow-servants are reasonably

¹ Pope Glucose Co. v. Byrne, 60 Ill. App. 17.

² Chicago & E. I. R. Co. v. Beatty, 40 N. E. 753 (Ill. App.).

³ Acme Coal Min. Co. v. McIver, 5 Colo. App. 267, 38 Pac. 596.

⁴ Coal and Mining Co. v. Adm'r of Clay, 51 Ohio St. 542.

competent, or if inexperienced men are employed, under a necessity unknown to him, that he would be so informed, or at least given a reasonable chance to learn the fact before being put in peril.¹

1556. An engineer and conductor placed a coach and baggage car on a switch, remaining with them while the train went to the station with the fireman acting as engineer. On returning, while engaged in coupling the cars, a brakeman was injured by the negligence of such fireman in handling the engine. It was held that the fact that such brakeman knew the fireman was handling the engine and made no objection did not preclude a recovery.²

1557. In order to recover for the death of a servant, caused by the negligence of a co-employee, it must be shown that at the time of the injury the deceased had no knowledge of such employee's incompetency.³

1558. Proof that a plaintiff did not know that the fellow-servant was incompetent is admissible as bearing upon the question of contributory negligence under an allegation that when the injury was received plaintiff was in the prudent and careful discharge of his duties.⁴

1559. It was said that if the engine-wiper, who was injured by the act of a foreman in handling an engine, knew that the foreman, not being a regular engineer, was incompetent, then he was chargeable with a knowledge of the danger of attempting to couple cars and assumed the risk.⁵

1560. Where an employee was injured by the negligence of a co-employee, caused by the latter's intoxication, and it appeared that the plaintiff had seen him drunk on three occasions during the eight days of his employment, but he did not report the facts to the defendant or leave his employ-

¹C., St. L. & P. R. Co. v. Cham- Trimble, 35 N. E. 716, 8 Ind. App. pion, 36 N. E. 221, 37 N. E. 21, 9 333.
Ind. App. 510.

²Nicolaus v. C., R. I. & P. R. Co. Vt. 436, 26 Atl. 485.
(Iowa), 57 N. W. 694.

³Toledo, St. L. & K. C. R. Co. v. Schwabbe, 1 Tex. Civ. App. 573.

⁴Henry v. Fitchburg R. Co., 65

⁵Gulf, C. & S. F. R. Co. v.

ment on that account, it was held a question for the jury whether the plaintiff was chargeable with negligence.¹

1561. Where an engineer was injured by the negligence of the conductor of another train, and there was no evidence that the engineer had any opportunity to learn that the conductor was incompetent, it was held not error to charge that if the engineer had an equal chance with the defendant company to know the character of the conductor and the danger of his employment, and failed to notify the company, the defendant was not liable.²

H. *Number of Servants.*

1562. It is the duty of a railroad corporation to see that there are a sufficient number of brakemen upon a train when it starts upon its trip. If this duty is neglected, and injury to a servant results therefrom without contributory negligence on his part, the company is liable, although the immediate negligence in starting the train without sufficient brakemen is that of a co-servant.³

1563. Where a railroad company had in its employ, and assigned to their regular duty and position, a full complement of brakeman upon a train, and on the day in question one of such failed to appear at the starting of the train, which was dispatched without one in his place, and while on its course the train broke in two, whereby the rear portion of the train, moving backward and without control, collided with a train closely following, killing its fireman, and there was evidence from which it might be determined that the third man would have been stationed upon some one of the eleven detached cars, and with the aid of one of the others who was upon them would have been enabled to stop them, it was held there was negligence chargeable to

¹Thompson v. Ross, 58 Hun, 415.

³Booth v. Boston & Albany R.

²Bonner v. Whitcomb, 80 Tex. Co., 73 N. Y. 38.

178, 15 S. W. 899.

the defendant in dispatching such train without the full complement of men.¹

1564. It is the duty of railroad companies to furnish a sufficient number of hands to operate their trains with safety.²

1565. Where it was the usual and customary method to operate through trains with only two brakeman, an employee injured cannot be heard to assert that the train was insufficiently manned.³

1566. Where it appeared that in the night-time two engines from some cause unknown ran away from the railroad yard after their run was over, and came into collision with a third upon the track, causing injury to a brakeman, and there was only one man in the yard who was charged with the duty of looking after the engines, and the two engines ran away while he was engaged in wiping another, it was held the railroad company was liable for failure to take reasonable precautions to provide against the engines being put in motion by themselves or by outside parties. Whether the employment of but one person to care for the engines, as well as to act as watchman, was such reasonable precaution was a proper question for the jury.⁴

1567. Where it appeared that only one brakeman was upon ten loaded cars while upon a descending grade, and only one brake set, it was held that this was sufficient to permit the jury to pass upon the question whether there was negligence in the failure to employ a sufficient number of men.⁵

1568. Where the negligence claimed was that there should have been some person to ascertain the condition of the track after a violent storm and warn moving trains of any defect thus caused, the court used the following language: "We

¹ *Flike v. Boston & Albany R. Co.*, 53 N. Y. 549.

² *C. & N. W. R. Co. v. Donahue*, 75 Ill. 106.

³ *Relyea v. K. C., Ft. S. & G. R. Co.*, 112 Mo. 86.

⁴ *Southern Pacific R. Co. v. Laferty*, 57 Fed. 536 (C. C. A.).

⁵ *Georgia Pacific R. Co. v. Propst*, 90 Ala. 1, 7 So. 635.

say there must be servants enough, not only for ordinary, but for extraordinary occasions, and that after every storm, threatening the road, every part of it must be examined before a train passes, and that it will not do to say that one man cannot be in two places at one time, but there must be a man for every place as need may be.”¹

1569. The rule that where the master is informed by the servant of a defect that makes the employment more hazardous and promises to remedy such defect, the servant may remain in the service a reasonable time to avail the fulfillment of the promise without being guilty of negligence, was applied to a promise made by the employer to an employee that he would furnish a sufficient number of men to properly and safely conduct the work. Hence, where it appeared that a conductor was injured while doing work that properly belonged to a brakeman, but which he was obliged to do because a sufficient number of men were not employed on his train, and the superintendent had promised to give him another man in a few days or after a little, it was held that it became a question for the jury whether the plaintiff remained in the defendant's employ for more than a reasonable time thereafter. (The case does not disclose the period of time he so remained after the promise.)²

1570. Where a laborer in a mill-yard was injured in attempting to move some heavy steps, assisted by two other laborers, and they were too heavy for the three to handle, it was held that an action could not be maintained against the employer, as it appeared there were several other laborers at hand who could have been called to assist. That if there was negligence it was that of the plaintiff or his fellow-servants in not calling the men to assist. If there was danger it was obvious to the plaintiff and his fellow-servants.³

¹ Hardy v. Carolina Cent. R. Co.,
76 N. C. 5.

³ Dunlap v. Barney Mfg. Co., 148
Mass. 51.

² Joliet, A. & N. R. Co. v. Velie
(Ill.), 26 N. E. 1086.

1571. Where the claim was made that the proximate cause of a servant's injuries was an insufficient number of men to hoist a timber to a brace which was being prepared, it was held that if such was the case it was a patent defect and the employee assumed the risk thereof.¹

1572. It was held that the violation of its duty by a railroad company to employ a sufficient number of hands for the safe management of its trains was not available to a conductor who had charge of the train and who had run the train for a length of time without a full complement of hands.²

1573. Where a railroad laborer riding on a hand-car with three others injured his hand while lifting the car from the track, and the charge was that his injuries were due to an insufficient force of men to perform that service, and the court was requested to charge that if the weight of the car and the number of men necessary to handle it was a matter open and patent to common observation, the plaintiff could not recover, it was held that the charge should have been given; that it stated the law.³

1574. An employee of long service was injured while unloading rails from a car by a rail falling upon him. His contention was that such duties required the service of eight men to properly perform them, and that only five were at the time and had for some time been provided, and charged that the cause of his injury was the failure to provide a sufficient number of men. It was held that the dangers were perfectly obvious. That as he must have known as well as the company the number of men the service required, he assumed the risk by continuing the employment.⁴

¹ *Texas & Pacific R. Co. v. Rogers*, 57 Fed. 378 (C. C. A.). *Drake*, 53 Kan. 1, 35 Pac. 825; *Eddy et al. v. Rogers* (Tex.), 27 S. W. 295:

² *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541. *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 Kan. 315; *I. & G. N. R. Co. v. Tarver*, 72 Tex. 308, 11 S. W. 1043.

³ *St. Louis, A. & T. R. Co. v. Lemon*, 83 Tex. 143, 18 S. W. 331.

⁴ *Southern Kansas R. Co. v.*

1575. Where an employee was injured while engaged in loading iron upon a car by a piece of the iron falling back upon him, and it was charged that his injuries were due to a lack of sufficient help, and it appeared that he was accustomed to loading iron and knew how many men were necessary, which, according to his testimony, was from six to ten men, while only five were thus engaged, it was held that since he knew as well as the defendant the number of men required, he could not recover.¹

1576. Where there were at hand the usual crew of men to do the work, and it was not usual for the yard-master or his assistant to take part in the work, it was held that a verdict could not be sustained on the ground that the jury had a right to say that the absence of such assistant contributed to the injury.²

1577. Where the plaintiff claimed that his injury was caused by the improper location of a water-keg on a hand-car, it was held that an instruction authorizing the jury to find for the plaintiff, if they believed there was not a sufficient number of men furnished to help plaintiff move the car from the track, was error.³

1578. A charge that the plaintiff assumed the risk if he knew or might have known that the number of persons engaged in the work was insufficient was properly refused, in that the jury were not informed as to the degree of care required of plaintiff to ascertain whether the number of persons was sufficient.⁴

1579. Where it is essential to the safety of laborers employed in the hold of a vessel that a person be stationed to warn them when articles are about to be lowered into the hold, the master is liable for an injury resulting from failure to furnish such an employee.⁵

¹ Eddy v. Rogers (Tex. App.), 27 S. W. 295.

² Harvey v. N. Y. C. & H. R. R. Co., 10 N. Y. S. 645.

³ Harty v. St. L., I. M. & S. R. Co., 95 Mo. 368, 8 S. W. 562.

⁴ International & G. N. R. Co. v. Beasley (Tex. App.), 29 S. W. 1121.

⁵ Ocean Steamship Co. v. Cheeney, 95 Ga. 381, 22 S. E. 544.

1580. A car-repairer who charged he was injured by reason of the neglect of the company to keep its yard free from ice and snow and to furnish him proper assistants was held to have assumed the risk of injury from such causes. The car upon which he was working was placed at the place indicated by him and help was at hand if he had called for it, which he did not.¹

1581. Where the right to recover by an employee who was injured by reason of a defective appliance upon a car was based upon the allegation that an insufficient force of car inspectors was provided and one was incompetent, and it appeared that the train which included the car in question was inspected, and that the evidence as to the one's incompetency was merely that sometimes when not on duty he got drunk, it was held there was not sufficient to charge the defendant with any neglect of duty which was the cause of the plaintiff's injury.²

1582. It was held that an employee who, after having knowledge that there was an insufficient number of hands on the train, attempted to make a coupling without objection, could not be heard to urge such insufficient number as ground of recovery, it appearing that after such consent the number of hands would in no way affect the result.³

1583. Missouri rule.—Where a brakeman was injured while in the act of coupling cars, which injury it was charged was occasioned by a want of a sufficient number of men to convey signals to the engineer, and it appeared that he was experienced in the business and had worked with such insufficient crew more than a week, it was held that he did not thereby assume the risk, but rather it was a question for the jury whether he was wanting in ordinary care. It was said: If the defects or insufficiency in appliances, which term embraces the men employed to do the work as well as

¹ Way v. C. & N. W. R. Co., 76 Iowa, 393.

³ Richmond & D. R. Co. v. Mitchell, 92 Ga. 77, 18 S. E. 290.

² St. Louis, I. M. & S. P. R. Co. v. Gaines, 46 Ark. 555, 13 S. W. 740.

other instrumentalities employed, is so great that obviously with the use of great caution the danger is imminent, then as matter of law the servant who incurs the risk is guilty of contributory negligence and cannot recover. But if upon this question there is substantial doubt, the question is one of fact for the jury.¹

I. *Duty Personal to the Master.*

1584. Where there is a general manager or superintendent who is invested by the common employer with the duty and authority of employing and discharging inferior agents and servants who are under him, the master is responsible for the acts of negligence on the part of the superintendent in failing to exercise due care and diligence in the employment of competent agents or in not dismissing those who are proved to be incompetent.²

1585. Whoever exercises the power of appointing and removing employees or servants, though his grade of employment as to other matters makes him their fellow-servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence or mistakes in selecting employees are the negligence or mistakes of the corporation.³

1586. There is not a performance of the master's duty until there have been placed for the servants' helpmates fit and competent fellow-servants, or due care used to that end. It is not enough to satisfy the affirmative duty or contract of the master that he selects one or more than one general agent of approved skill and fitness. If the general agent goes forward and carelessly places by the side of a servant another unskilled and incompetent, the duty of the master has not been met, his contract is yet unperformed.⁴

¹Thorpe v. Missouri Pac. R. Co., 89 Mo. 650. See Stoddard v. St. L., K. C. & N. R. Co., 65 Mo. 514. ³Tyson v. South & North Ala. R. Co., 61 Ala. 554.

²Walker v. Bolting, 22 Ala. 294. ⁴Laning v. N. Y. Cent. R. Co., 49 N. Y. 521.

1587. One who has the power to employ and discharge laborers is the vice-principal as regards the duty to warn such laborers of special risks in their employment.¹

1588. One servant of a corporation to whom is delegated the power of hiring and discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may ordinarily be required to do, is as to such servants whom he so hires, discharges and controls the representative of the master, when exercising such power of control, and not a fellow-servant, nor is he in the same line of employment as the servant he so controls.²

1589. The duty of the selection of servants is one that is personal to the master, and so is the duty of the supervision of the business. If these duties are delegated to a general manager, a foreman or superintendent, such officer, whatever he may be called, must stand in the place of the principal, and the latter must assume the risks of his negligence.³

1590. There are certain duties which cannot be delegated to an agent or servant, so as to relieve the master of responsibility — among other things, the duties of selecting competent servants, the providing of suitable machinery and appliances and a safe place to work. Under this head will be included the providing of a safe method of moving trains.⁴

1591. The duty of the master to exercise due care in the selection and retention of his servants is personal to the master, and one which he cannot delegate to an agent so as to absolve himself from responsibility; and such duty is not fully met by inquiring at the time as to the servant's fitness, but requires that he shall keep a supervision over his work and thereby keep advised as to his continued fitness.⁵

¹ *Ft. Smith Oil Co. v. Slover*, 58 Ark. 168, 24 S. W. 106.

² *Chicago & Alton R. Co. v. May*, 108 Ill. 288.

³ *Quincy Mining Co. v. Kitts*, 42 Mich. 34.

⁴ *Adams v. Iron Cliffs Co.*, 78 Mich. 271.

⁵ *Baltimore & Ohio R. Co. v. Henthorne*, 73 Fed. 634.

1592. Where the master delegates to a superintendent the power to employ and discharge servants and to provide and remove materials, which inhere in him as master, he thereby makes himself liable for any injuries sustained by his servants caused by the lack of care or negligence of such superintendent.¹

1593. The failure of the conductor of a freight train to employ or to secure a brakeman, in a case where one employed failed to appear, and in starting the train with an insufficient force, as a result of which neglect a brakeman was killed, was held the negligence of the master. It was the duty of the master to see that sufficient men were upon the train when it started to properly man it, and whoever failed in performing this duty their neglect was chargeable to the master.²

1594. The officer having charge of the department of the business in which the alleged injury occurs is the person required to use that degree of diligence in the selection of competent employees which is necessary to exempt the company from liability for their negligence. His carelessness and knowledge in this respect is the carelessness of the company.³

1595. A corporation can only act through its officers and agents, and the officer having charge of its business for practical purposes must be regarded as the corporation.⁴

1596. The Rhode Island court repudiate the test applied by some courts, that the power to hire and discharge help makes one a vice-principal, and hold that it can only be a test when the question involved is that of selecting or retaining proper servants, and in this respect the servant would clearly represent the master.⁵

¹ *Brothers v. Carter et al.*, 52 Mo. 372.

² *Flike v. Boston & Albany R. Co.*, 53 N. Y. 549.

³ *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104.

⁴ *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146.

⁵ *Hanna v. Granger City Treasurer*, 18 R. I. 507, 28 Atl. 659.

CHAPTER IX.

EVIDENCE.

- A. *Accident, as Proof of Negligence*, 1597 et seq.
- B. *Accident, Similar, Independent Acts of Negligence*, 1625 et seq.
- C. *Accident, Precautions After*, 1632 et seq.
- D. *Accident, Conditions After*, 1644 et seq.
- E. *Agency, Proof of*, 1648.
- F. *Agents, Admissions of*, 1649 et seq.
- G. *Burden of Proof*, 1658 et seq.
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- O. *Models, Plats and Diagrams*, 1770 et seq.
- P. *Mental Suffering*, 1776.
- Q. *Positive and Negative Proof*, 1777 et seq.
- R. *Reputation*, 1784 et seq.
- S. *Scintilla*, 1787 et seq.
- T. *Speed of Trains*, 1790 et seq.
- U. *Variance*, 1793.

A. *Accident, as Proof of Negligence.*

1597. The mere fact of injury or happening of an accident does not raise a presumption of negligence.¹

1598. The mere fact of a collision of trains does not establish a presumption of negligence on the part of the railroad

¹ Philadelphia & Reading R. Co. & Colby Const. Co., 44 Wis. 405; v. Hughes, 119 Pa. St. 301; Melchert Smith v. Railway Co., 42 Wis. 520; v. Brewing Co., 140 Pa. St. 448; Ash Steffen v. Railway Co., 46 Wis. 259; v. Verlenden, 154 Pa. St. 246; Toledo, W. & W. R. Co. v. Moore, Quincy Mining Co. v. Kitts, 42 Adm'x, 77 Ill. 217; Sack v. Dolese, Mich. 34; Dobbins v. Brown et al., 137 Ill. 129, 27 N. E. 62; Toomey v. 119 N. Y. 188; Morrison v. Phillips Eureka I. & S. Works, 89 Mich. 249;

company in favor of its employees, such a presumption existing only in favor of passengers.¹

1599. The mere fact of the explosion of a steam-boiler was held not to raise a *prima facie* presumption of negligence on the part of the master.²

1600. Where a servant was injured by the breaking of a chain used in raising a wrecked and derailed car, it was said: The mere fact of the breaking of the chain is not sufficient to authorize the inference or presumption that the master had failed to exercise reasonable care in its selection.³

1601. It was said that the accident having occurred because of defective appliances, the defendant must show that in the selection and operation of the machinery which caused or contributed to the accident, it used due care, skill and watchfulness.

Tuttle v. Chicago, R. I. & P. R. Co., 48 Iowa, 236, is cited as sustaining this position. It should be borne in mind, however, that in that case the injury was to a passenger.⁴

1602. The mere fact that a cup in a lantern fell out while a brakeman was performing his duties, necessitating the obtaining of another lantern from the caboose, was held not sufficient to show that the defendant had failed to use ordinary care in the matter of furnishing a reasonably safe appliance.⁵

1603. The rule was applied where a section-man was injured by a stone which in some manner was thrown from under a moving train.⁶

Redmond v. Delta Lumber Co., 96 Mich. 545; *Knight v. Cooper et al.*, 36 W. Va. 232, 14 S. E. 999; *Johnson v. Railroad Co.*, 25 W. Va. 570.

See *Bailey's Master's Liability*, pp. 508, 509, for other cases and a discussion of the rule.

¹*Smith v. Missouri Pac. R. Co.*, 113 Mo. 70.

²*Huff v. Austin et al.*, 46 Ohio St. 386; *Toledo, W. & W. R. Co. v. Moore*, Adm'x, 77 Ill. 217.

³*Brymer v. Southern Pacific R. Co.*, 90 Cal. 496. See *Morton v. Railway Co.*, 81 Mich. 423.

⁴*Brann v. Chicago, R. I. & P. R. Co.*, 53 Iowa, 595.

⁵*Davis v. Columbia, etc. R. Co.*, 21 S. C. 93.

⁶*Steffen v. Railway Co.*, 46 Wis. 259.

1604. Again, where there was a latent defect in a brake-rod.¹

1605. Again, where a car wheel broke from some cause unknown, the track being in good order and the wheels free from defects.²

1606. Again, where a brake-chain parted, or something gave out, so that the brake-wheel suddenly turned with a brakeman and threw him from the car.³

1607. The instinct of self-preservation, planted in all persons, may, in a proper case, be allowed some weight as raising an inference of care on the part of the person incurring danger, but if the direct evidence shows care or want of it, there is no room for a mere inference.⁴

1608. The fact that a box placed on a hand-car by order of the foreman, and on which he is standing to hold it on, struck a station platform as the car was passing, throwing and injuring one of the employees, of itself makes out a *prima facie* case of negligence, which it devolves upon the defendant to meet.⁵

1609. It was held that a brakeman thrown from a car while releasing a brake could not recover for resulting injuries in the absence of evidence of any defect in the brake that would cause it to stick, or proof of any fact accompanying its release that would tend to throw him off.⁶

1610. Where the alleged cause of injury was the bursting of an emery wheel, and there was no evidence that there was anything improper in the construction or setting up of the machine, or any defect in the wheel known, or which ought to have been known, to the employer, it was held that the plaintiff could not recover.⁷

¹ Smith v. Railway Co., 42 Wis. 520.

² Morrison v. Phillips & Colby Const. Co., 44 Wis. 405.

³ Sack v. Dolese, 137 Ill. 129, 27 N. E. 62.

⁴ Dunlavy v. C., R. I. & P. R. Co., 66 Iowa, 435.

⁵ Louisville & N. R. Co. v. North-
ington, 91 Tenn. 56, 17 S. W. 880.

⁶ Louisville & N. R. Co. v. Binion,
98 Ala. 570, 14 So. 619.

⁷ Simpson v. Pittsburg Locomo-
tive Works, 139 Pa. St. 245, 21 Atl.
385.

1611. It was held error to charge that, if the car was overturned by reason of any defect in said car or of the track upon which it was running, this was of itself presumptive evidence of negligence, and that the burden is then on the defendant to show that there has been no negligence whatever. Such presumption does not arise as between master and servant.¹

1612. Where an employee was injured by the fall of a dirt-plow from a car, and under the charge of the court the jury were permitted to find from the fact that the accident occurred, without any evidence of negligent or unskilful construction of the plow, or of a failure to keep it in repair, that the falling of the plow was owing to the fault of the defendant, it was held that this was error.²

1613. The mere fact that a machine that is shown to have performed work properly both before and after an accident failed so to work on the particular occasion is not sufficient to justify a conclusion of negligence.³

1614. Where an elevator fell, and it appeared after the accident that one of the balance ropes had become detached, the eye having slipped off the hook, and the weight attached to the opposite end had fallen to the cellar, and it was also found that the key or pin which held the wheel on the axle above had come out, it was said: The sudden breaking or giving way of a piece of machinery, properly constructed, is not sufficient to justify the conclusion of negligence. Machinery so constructed often gives way from some unknown cause or hidden defect. The fact that once before it had descended in a manner similar to that in the present case is not evidence that it was out of repair, as in that case the accident may have resulted from a failure to set and lock the brake.⁴

¹ *Minty v. Union Pacific R. Co.*,
2 Idaho, 437, 21 Pac. 660.

² *De Vaw v. Penn. & N. Y. C. &
R. Co.*, 130 N. Y. 632.

³ *Redmond v. Delta Lumber Co.*,
96 Mich. 545.

⁴ *Robinson v. Wright & Co.*, 94
Mich. 283.

1615. The mere happening of an accident is, if it is one that the exercise of ordinary care would prevent, some evidence of negligence.¹

1616. Where an employee was injured while removing waste from under a machine by the machine suddenly starting, the belt slipping from the loose pulley to the tight pulley, and no person was able to point with certainty to the cause of the transfer of the belt from the loose pulley to the tight pulley, if in fact it was so transferred, and no special defect in the situation or construction of the machine was pointed out, it was held that, because the machine started on this and three other occasions, the jury had no right to infer that there existed a defect of some kind which the defendant was negligent in not providing against, and a nonsuit was therefore proper.²

1617. Where a person not an employee was injured while passing along a street under the defendant's elevated railroad structure by a portion of a broken bolt to which was attached an iron plate falling from such structure upon him, and defendant proved that its road had been properly constructed, and by its track-walker and inspector, whose duty it was to examine all bolts and fastenings and keep them tight, that he followed instructions to the best of his ability, and did not discover the defect, and plaintiff's counsel asked to have defendant's negligence submitted to the jury on the ground that the fact that the bolt fell was presumptive evidence that the defendant was negligent, which request was denied and a verdict directed for the defendant, it was held error; that the fact that the bolt was broken and part of it fell was sufficient to raise a presumption that, in that particular, defendant's structure was out of repair and dangerous; that the evidence of the inspector was not sufficient to remove such presumption.³

¹ Mahoney v. New York & N. E. R. Co., 160 Mass. 573.

³ Volkmar v. Manhattan Ry. Co., 134 N. Y. 418.

² Dingley v. Star Knitting Co., 134 N. Y. 552.

1618. Where an employee was killed by the falling of a roof while being raised, and there was no evidence of his negligence nor of the cause of the falling of the roof, it was held that the fact that the roof fell was sufficient evidence of defendant's negligence in executing the work to carry the case to the jury. It was said: In this case the falling of the roof was in and of itself some evidence that the work was not being done with ordinary care and skill. It is true that the mere fact of an injury does not impute negligence on the part of any one, but where a thing happens which ordinarily would not have occurred if due care had been used, the fact of such happening raises a presumption of negligence in some one.¹

1619. It was held that the fact of an explosion of a steam tank raised a presumption of negligence which the defendant was required to negative.²

1620. It was said in reference to a cistern wall in process of construction which fell, injuring a laborer engaged in throwing gravel behind it, the fact that the wall fell by its own weight or by the pressure of gravel and earth behind it, placed there by the defendant, raised a presumption of negligence. If it had been properly constructed, it is common observation and within the common course of things that it would not have fallen, therefore it was not properly constructed; and it was negligently constructed because by the exercise of ordinary care and prudence such a wall would have been so constructed that it would not have fallen, but would have stood alone.³

1621. As a general rule the proof of an occurrence of an accident does not raise a presumption of negligence. Where the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the negligent conduct of the defendant is a reasonable inference, a case is presented which calls for a defense.⁴

¹ *Barnowski v. Helson*, 89 Mich. 523, 50 N. W. 989.

³ *Mulcairns, Adm'x, v. City of Janesville*, 67 Wis. 24.

² *Allerton Packing Co. v. Egan*, 86 Ill. 253.

⁴ *Bahr v. Lombard et al*, 53 N. J. L. 233.

1622. It was stated: "The accident having occurred from defective appliances, the defendant must show that in the selection and operation of the machinery which caused or contributed to the accident, it used due care, prudence, skill and watchfulness."

This was said where a conductor was injured by the breaking of a round in a ladder upon a car, no proof having been offered as to knowledge on the part of the company of the defect or the length of time it had existed, or that it was patent.¹

1623. The fact that a rope which was being used broke was held to be *prima facie* evidence of negligence on the part of the employer. Yet an instruction that the burden shifted upon the defendant, to show by a clear preponderance that he used proper diligence to ascertain defects in the rope, was held improper. The jury should have been told that it was incumbent upon the defendant to explain.²

1624. Where an employee of a railroad company, who was injured by falling from the foot-board of an engine, testified that the board gave way under him, and after the accident the board was found to be broken, it was held that it was a question for the jury to determine whether the board was unsound or insecurely fastened, or was broken by the plaintiff's fall. It was said: From the mere fact that the foot-board gave way under him, as he testified, and presumably the jury found it did, the natural if not necessary inference would be, either that the board had become unsound or was insecurely fastened; and the inference that it had become unsound is supported by the evidence offered by the condition of the board after the accident. That condition, it is true, might be accounted for by the supposition of the defendant that the board was split by reason of its contact with plaintiff after his fall, but that would be inconsistent with the plaintiff's testimony that his fall was

¹Goodman v. R. & D. R. Co., 81 Va. 576.

²Puget Sound Iron Co. v. Lawrence, 3 Wash. Ter. 226, 14 Pac. 869.

caused by the board giving way. Between the conflicting theories of the accident it was the province of the jury to decide, though it could only be done by inference.¹

B. Accident, Similar, Independent Acts of Negligence.

1625. Evidence that the appliance had on former occasions failed to properly operate, of which the defendant was charged with knowledge, is admissible.²

1626. Where the injury was received while operating a machine, caused by alleged defective construction, it was held competent to prove that on former occasions while it was being operated by another, the machine worked in a manner similar to when the employee was injured. But such evidence is only competent to prove the defective character of the machine and the employer's knowledge of the fact. It is not competent for the purpose of proving the employer's negligence at the time of the employee's injury, and the jury should be so instructed at the time it is received.³

1627. Where an employee, injured while coupling cars, caused, as was alleged, by the overlapping of the dead-woods, which was owing to the different character of the cars used, it was held that the admission of testimony showing that similar accidents had occurred on defendant's road was error, it was said: Where it is important to show that a defendant had notice of the dangerous character of a defect which caused the injury, testimony is competent to prove other similar accidents; such evidence is not competent where it can have no bearing upon the issue presented. In this case it did not tend in any degree whatever to the establishment or support of the plaintiff's cause of action to show that the defendant had knowledge of the dangers incident to the coupling of such cars as those which were the occasion of the plaintiff's injury.⁴

¹ Atchison, T. & S. F. R. Co. v. Mulligan, 67 Fed. 569.

² Myers v. Hudson Iron Co., 150 Mass. 125, 22 N. E. 631.

³ Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N. E. 55.

⁴ Dye v. Del. L. & W. R. Co., 130 N. Y. 671.

1628. Where an employee operating an elevator was injured by the falling of one of the iron weights by means of which the elevator was operated, and there was no proof as to what caused it, it was held that it was incumbent upon the plaintiff to show that the elevator was in a dangerous condition, which proper care would have prevented, and that the injury was caused by that condition. It is not enough to prove the injury.¹

1629. Proof of similar accidents at the same switch, under same conditions, is admissible.²

1630. Evidence that another employee, working by the side of the one injured, who was run over by a switch-engine, came so near being run over that the engine struck his foot, is admissible to show that the peril of the deceased was not brought about by his own negligence.³

1631. The testimony of a co-employee that he was not instructed concerning certain dangers connected with the employment was held admissible to rebut the testimony of the defendant that plaintiff was so informed.⁴

C. *Accident, Precautions After.*

1632. The mere fact that after the accident the defendant took precautions to prevent a repetition of the same is inadmissible as evidence of negligence at the time or that the premises or appliances were not in proper condition.⁵

¹ Davidson v. Davidson et al., 46 Minn. 117, 48 N. W. 560.

² Clapp, formerly Morse, v. Minneapolis & St. L. R. Co., 36 Minn. 6, 29 N. W. 340.

³ Missouri Pacific R. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 838.

⁴ Fox v. Peninsular, W. L. & C. W., 92 Mich. 243, 52 N. W. 623.

⁵ Lang v. Sanger, 76 Wis. 71; Castello v. Landwehr, 28 Wis. 524; Downey v. Sawyer, 157 Mass. 418; Columbia & Puget Sound R. Co. v.

Hawthorne, 144 U. S. 202; Shiners v. Props. Locks & Canals, 154 Mass. 168; Menard v. Boston & Maine R. Co., 150 Mass. 386; Dougan v. Champlain Trans. Co., 56 N. Y. 1; Baird v. Daley, 68 N. Y. 547; Corcoran v. Peekskill, 108 N. Y. 151; Nally v. Hartford Carpet Co., 51 Conn. 524; Terre Haute & Ind. R. Co. v. Clem, 123 Ind. 15; Hodges v. Percival, 132 Ill. 53; Cramer v. Burlington, 45 Iowa, 627; Hudson v. C. & N. W. R. Co.,

1633. It was held that evidence to the effect that the switch-engine by which plaintiff was injured had been repaired since the accident was improper. The grounds upon which such testimony should be excluded were said to be twofold: 1st. That the making of repairs to a piece of machinery after an accident had occurred has no legitimate tendency to show that such piece of machinery was not in an ordinarily safe and fit condition for use before repairs were made. 2d. Because the admission of such evidence for the purpose of showing that defendant had been negligent has a strong tendency to discourage employers in making alterations and repairs.¹

1634. Testimony as to subsequently occurring events, like the substitution of a new for the old block (in frogs), is inadmissible for the purpose of originating an inference or implied admission of negligence because of failure to make substitution at an earlier period.²

1635. That a defective appliance was repaired after an accident may be shown upon the question of what was broken, and how, and what was wanting, but it is improper for the purpose of showing that the employer was negligent in not making repairs and alterations before the accident.³

1636. It was held that a change made, substituting an entirely new apparatus, was no indication that the earlier one was defective, nor are changes made after an accident evidence of negligence in the use of the former.⁴

1637. Evidence is irrelevant that within twenty-four hours after an accident, alleged to have been caused by a

59 Iowa, 581; *Morse v. Minn. & St. L. R. Co.*, 30 Minn. 465; *Motey v. Pickle Marble & Granite Co.*, 74 Fed. 155; *Cherokee & P. Coal & Min. Co. v. Britton* (Kan. App.), 45 Pac. 100.

¹ *Atchison, T. & S. F. R. Co. v. Parker*, 55 Fed. 595.

² *Hipsley v. Railroad Co.*, 88 Mo. 348; *Brennan v. St. Louis*, 92 Mo. 482; *Alcorn v. Chicago & Alton R. Co.*, 108 Mo. 81.

For a discussion of the rule and additional cases, see *Bailey's Master's Liability*, p. 525 et seq.

³ *Norris v. Atlas Steamship Co.*, 37 Fed. 426.

⁴ *Downey v. Sawyer*, 157 Mass. 418.

worn and defective block, it was replaced by a new one. Its admission cannot be rejected as a harmless error.¹

1638. It was held error to admit evidence that, after an injury caused by the operation of a piece of machinery made of iron, the defendants substituted another machine made of brass, and that they ran this at a lower rate of speed.²

1639. It was held error to permit plaintiff to prove that, subsequent to an accident, defendant posted notices at its works warning all employees at work on its lines and circuits to quit work at 4 o'clock. It was said: The liabilities of the defendant must be determined from what took place before and at the time of the accident. What it did afterwards, by way of precaution to avoid future accidents, should not be construed into an admission by it of a previous neglect of duty.³

1640. Notwithstanding the Minnesota court had held that evidence of repairs or changes being made after an accident was admissible as an admission of previous negligence, it is now held that such acts are not admissible under any circumstances as an admission of previous neglect of duty, because they afford no legitimate basis for drawing any such inference from them.⁴

1641. A report made by plaintiff to the employer, in compliance with a rule as to how his injuries were received, and his letters making claim for damages, are inadmissible in evidence in his own behalf.⁵

1642. Where the cause of injury was alleged to be the incapacity of a passage-way for water, it was held competent to prove that, after the accident occurred, the defendant enlarged the capacity of such water-way, but only as an

¹ *Alcorn v. Chicago & Alton R. Co.*, 108 Mo. 81, 14 S. W. 943.

² *Lowe v. Elliot et al.*, 109 N. C. 581, 14 S. E. 51.

³ *Colorado Electric Co. v. Lubbers*, 11 Colo. 505, 19 Pac. 479.

⁴ *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, 16 N. W. 353.

⁵ *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. 452.

admission on the part of the defendant that the water-way was originally too small. That such evidence did not of itself prove negligence, nor notice of its insufficiency prior to the accident, nor that the defendant might have had notice by the exercise of proper diligence, nor that it did not exercise such diligence.¹

1643. Where repairs are made upon a machine shortly after an accident has occurred at the machine, evidence of such repairs is competent as tending to establish that it was not safe at the time of the accident.²

D. Accident, Conditions After.

1644. Evidence was held competent to show the defective condition of a hand-hold upon a car after the accident. This for the purpose of proving the nature and character of the defect causing the injury.³

1645. That a defective appliance was repaired after an accident may be shown upon the question of what was broken, and how, and what was wanting, but it is improper for the purpose of showing that the employer was negligent in not making repairs and alterations before the accident.⁴

1646. Where an employee was injured while operating an elevator, the testimony of a former employee as to the condition of the elevator six months prior to the accident was held inadmissible, where it appeared the elevator had been repaired three months before the action. It was also held that negligence could not be predicated on the fact that immediately after the accident some parts of the machinery

¹ *St. L. & S. F. R. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408.

² *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592, 15 Pac. 484; *Railway Co. v. Retford*, 18 Kan. 245; *City of Emporia v. Schmidling*, 33 Kan. 485; *City of Abilene v. Hendricks*, 36 Kan. 196.

³ *Gutridge v. Missouri Pacific R. Co.*, 94 Mo. 468, 105 Mo. 520. See, also, *Gulf, C. & S. F. R. Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151.

⁴ *Norris v. Atlas Steamship Co.*, 37 Fed. 426.

of the elevator were found out of place and loosened, as the strain upon the machinery from the fall of thirty feet would tend to impair it.¹

1647. Where the imperfect condition of a machine upon which an employee was working was alleged to be due to defects in the pulleys used in running the machine, it was held competent, after showing that the pulleys were in the same condition at the time of the trial, that the working condition of the machine was the same, and that the speed of the engine and machinery was the same at the time when the speed was taken as at the time of the accident, to show what that speed was; that the machine and pulleys were in good condition at the time of the trial and at other times shortly before and after the accident, and that the machine worked perfectly before and ever since the accident, the admission of such evidence having a tendency to show what the condition of the machine was, and how it operated at the time of the accident.²

E. *Agency, Proof of.*

1648. It was held not necessary to show that a superintendent acted under or by virtue of any special authority, if in point of fact he transacted the business with the knowledge and consent of the directors or officers of the board. It was said: If his name appeared in the schedules and time-tables of the road as its superintendent, and he acted as such in the management of the business, it was certainly competent as well as strong evidence of agency.³

F. *Agents, Admissions of.*

1649. The declaration of an agent made at the time of a particular transaction which is the subject of inquiry, and while acting within the scope of his authority, may be given

¹Robinson v. Wright & Co., 94 Mich. 283, 53 N. W. 538.

³Huntingdon & B. T. R. Co. v. Decker, 84 Pa. St. 419.

²Tremblay v. Harnden, 162 Mass. 383.

in evidence against the principal as a part of the *res gestæ*; but it is equally settled that the declarations of an agent, made after the transaction is fully completed and ended, are not admissible. The declarations of officers of a corporation rest upon the same principles as apply to other agents.¹

1650. The rule seems to have been extended in a particular case in allowing such declarations where they were to the effect that the agent had previous knowledge.²

1651. The declarations of an agent, sent by the defendant to obtain a statement of the circumstances of the accident, are not admissible in evidence, being mere hearsay.³

1652. A declaration of a superintendent, made after an accident has occurred, that if the machines had been in proper condition the accident would not have happened, is incompetent in an action against the employer.⁴

1653. Evidence that the defendant's superintendent, the day after the accident, stated to a third person that he knew of the defective condition of the dock which caused injury to an employee, and was repairing it but had not reached the place of accident, was held inadmissible.⁵

1654. It was held that the admission of the testimony of the principal that he had no knowledge or information that the appliances were defective or unsafe was proper. It was said: The defendants might be held liable, that, it being their duty to build and maintain the platform, they had built it in a negligent manner, or that they knew or by the exercise of reasonable diligence might have known that it had become unsafe. The fact that they did not know it would not be a defense, but they had the right to show that fact by any competent evidence in order to meet the claim that they had put the employee to work upon a place which they knew or ought to have known was defective.⁶

¹Huntingdon, etc. R. Co. v. Decker, 82 Pa. St. 119; Pennsylvania R. Co. v. Books, 57 Pa. St. 339.

²Baker v. Alleghany Valley R. Co., 95 Pa. St. 211.

³Doyle v. St. P., M. & M. R. Co., 42 Minn. 82, 43 N. W. 787.

⁴Shaffer v. Haish, 110 Pa. St. 575.

⁵Van Deusen v. Letellier et al., 78 Mich. 802, 44 N. W. 572.

⁶Boyle v. Mowry, 122 Mass. 251; Hull v. Hall, 78 Me. 114.

1655. The question whether a witness had heard any expression from one claimed to be a vice-principal, at the time of the accident or immediately after it, concerning the condition of an appliance, was held proper as a part of the *res gestæ*.¹

1656. Where an agent in charge of the work at the moment of the accident declared that he expected it, it was held that evidence of such declaration is admissible as part of the *res gestæ*, upon the question of defendant's knowledge of the condition of the appliance or unsafe condition of the place.²

1657. The declarations or admissions of an agent or employee, made at times far removed from the act to which they relate, are incompetent as evidence. The rule applied where it was sought to prove the declarations of a superior servant, relating to an appliance and its use, made before and after the accident.³

G. *Burden of Proof.*

1658. Where the trial court instructed the jury that where the employee is injured through any appliance or surroundings of the business, and it does not appear that the employee was at fault, the burden is on the employer to show that he himself was free from fault, it was held error, and the rule was said to be that the plaintiff in the first instance must prove enough to show a fair preponderance of negligence, and of resulting injury to himself.⁴

1659. The plaintiff must prove something which warrants the inference of negligence on the part of the defendant, and not base his case upon facts just as consistent with care and prudence as the opposite.⁵

¹ Mullan v. Philadelphia, etc. Steamship Co., 78 Pa. St. 25.

² Elledge v. National City & Otay R. Co., 100 Cal. 282.

³ Wilson v. Dunreath R. S. Q. Co., 77 Iowa, 429.

⁴ Lindall v. Bode, 72 Cal. 245.

⁵ Hayes v. Railroad Co., 97 N. Y. 259; Baulec v. Railroad Co., 59 N. Y. 357; Railroad Co. v. Schertle, 97 Pa. St. 450, 2 Am. & Eng. R. Cases, 158.

1660. Where the evidence is equally consistent with either view, with the existence or non-existence of negligence, it is not competent for the judge to leave the matter to the jury. The party who affirms negligence has failed to establish it. This is a rule which ought never to be lost sight of.¹

1661. Where the evidence leaves the cause of injury unproved, it cannot be attributed to defendant's negligence or fault.²

1662. That an injury was caused by the neglect of a fellow-servant was held to be an affirmative defense, and the burden upon the defendant to prove it.³

1663. Where an employee was injured by his hand getting caught under a steam-hammer, it being alleged that such injuries were caused by its imperfect condition, it was said: Although his injuries were caused by the defective hammer, or by the negligence of the agents of the defendant, or by both combined, he cannot recover without showing also that the defendant did not use reasonable care in procuring for its employees sound machinery and faithful and competent employees.⁴

1664. Georgia statute.—Under section 3033 the code puts the burden in all cases upon a railroad company to make it appear that its agents have used all reasonable care and diligence. The rule thus established, in connection with sections 2083 and 3086, requires the employee to show that the injury was caused without fault or negligence on his part.⁵

1664a. Where injury is caused by a fellow-servant, no presumption of negligence arises until plaintiff affirmatively shows that he himself was without fault.⁶

¹ *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Thompson on Negligence*, p. 364.

² *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 955, 9 So. 566.

³ *Bjorman v. Fort Bragg Redwood Co.*, 104 Cal. 626.

⁴ *Hanrathy v. Northern Cent. R. Co.*, 46 Md. 280.

⁵ *Campbell v. Atlantic, etc. R. Co.*, 53 Ga. 488; *Atlantic, etc. R. Co. v. Campbell*, 56 Ga. 586.

⁶ *Georgia R. & B. Co. v. Hicks*, 95 Ga. 301, 22 S. E. 613.

1664b. He is not required, however, to show both negligence on the part of the defendant and freedom from fault on his own part.¹

1665. The burden is upon the plaintiff to negative the presumption in favor of the employer, and it is not enough that he shows an injury sustained, but he must go further and show some specific act of negligence. This was held where the cause of a car dumping while in motion was unexplained, and was as consistent with the failure of co-employees to properly secure and fasten the hooks which held it in place as of neglect of duty in inspecting and keeping the car in repair, there being no defect in the car to which the accident might be attributable.²

1665a. An employee injured by the explosion of a boiler was held to have the burden of showing that the boiler was unfit for the use to which it was applied, and that the explosion was owing to particular defects pointed out.³

1666. Where a plaintiff obtains a verdict for injuries received by an alleged defective car, it appearing that the overwhelming weight of evidence was in favor of a sound car, that the plaintiff's account of the manner of his injuries was improbable, and his admission to others, before the action was brought, differing therefrom, it was held that the jury must have been influenced by some improper motive in rendering a verdict for the plaintiff, and a new trial should be ordered.⁴

1667. Where the question was whether the collapsing of the crown-sheet of a locomotive boiler was caused by its having been burned prior to the commencement of the trip or was occasioned by the negligence of the engineer during the trip, and such engineer testified that the crown-sheet was covered with water at all times during the trip as indi-

¹ Johnston v. Richmond & D. R. Co., 95 Ga. 685, 22 S. E. 694.

² Soderman v. Kemp et al., 145 N. Y. 427.

³ Texas & Pacific R. Co. v. Thomp-

son, 71 Fed. 531; Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228.

⁴ Roberts v. Boston & Maine R. Co., 83 Me. 298.

cated by the water-gauge, and experts who had examined the boiler after the accident testified that it could not collapse if covered with water, and, from its appearance, it must have been red hot at the time it collapsed, and there was no evidence that it was scorched at any other time, it was held that the evidence did not justify a verdict for the plaintiff.¹

H. *Carlisle and Other Mortuary Tables.*

1668. It was held that the testimony of an actuary as to the probability of the duration of life of a healthy man of a certain age, and the value of an annuity for the life of such person, calculated upon the basis that he earned a certain stated sum of money per annum, is not admissible where the injury is only partial. The rule seems to be, that where death results from the injury, or where the evidence tends to show that the earning capacity of the party is entirely destroyed, such testimony is admissible, otherwise not.²

1669. It is proper to permit a witness to testify that he is acquainted with tables used by life insurance companies in estimating the probable duration of life at any given age, and that the American table of mortality is used for that purpose by nearly all the companies in the United States, and in such case it is proper to admit such tables in evidence. They are not conclusive upon the question of the duration of life. The physical condition of the injured person at the time next preceding the injury, his general health, his avocation in life with respect to danger, his habits, and probably other facts, properly enter into the question.³

1670. Where it appears that a plaintiff was a healthy, strong man, and his age, occupation and earning power also appears, it is competent to show the expectation of life

¹ Hudson, Adm'x, v. Rome, W. & O. R. Co., 145 N. Y. 408. See EMPLOYMENT OF SERVANTS, BURDEN; ASSUMED RISK, BURDEN; CONTRIBUTORY NEGLIGENCE, BURDEN; CONJECTURE, under EVIDENCE.

² Texas Mexican R. Co. v. Douglas, 69 Tex. 694, 7 S. W. 77.

³ Mary Lee Coal & R. Co. v. Chambliss, 97 Ala. 171, 11 So. 897.

of such a man according to the Carlisle tables of mortality. The value of such tables when applied to a particular case will depend very much upon conditions, such as state of health, habits of life, social conditions, etc., and the attention of juries should be called pointedly to these qualifying circumstances.¹

1671. Carlisle tables are competent evidence, and the *Encyclopedia Britannica*, being a familiar work of science of unquestionable authority, may be introduced to show such tables.²

I. *Conjecture.*

1672. Where it is necessary to show a certain state of facts it is not sufficient to prove two or more different states of case, one of which may be sufficient, but either of which may equally, under the testimony, have existed.³

1673. The plaintiff must prove something which warrants the inference of negligence on the part of the defendant, and not base his case upon facts just as consistent with care and prudence as with the opposite.⁴

1674. Where the evidence is equally consistent with either view, the existence or non-existence of negligence, it is not competent for the judge to leave the matter to the jury. The party who affirms negligence has failed to establish it. This is a rule which never ought to be lost sight of.⁵

1675. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established.⁶

1676. Where a brakeman was killed and the accident was unknown until the train had proceeded some miles, and it

¹ *Steinbrunner v. Pittsburg, etc.* 357; *Hayes v. Railroad Co.*, 97 N. Y. R. Co., 146 Pa. St. 504. See, also, 254; *Railroad Co. v. Schertle*, 97 Sauter v. N. Y. C. & H. R. R. Co., Pa. St. 450, 2 Am. & Eng. R. Cases, 66 N. Y. 50. 158.

² *Worden v. Humeston & S. R. Co.*, 76 Iowa, 310. ⁵ *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Thompson, Negligence*, p. 364.

³ *Hughes v. Cincinnati, N. O. & T. P. R. Co.*, 91 Ky. 526, 16 S. W. 275. ⁶ *Douglas v. Mitchell*, 35 Pa. St. 443; *Cosgrove v. Pitman*, 103 Cal. 268.

⁴ *Baulec v. Railroad Co.*, 59 N. Y.

appeared that it was a dark night and he was last seen on a car going in the direction of a flat-car, to reach which he would be obliged to descend a ladder at the side of a car, and in doing so he would be in danger of contact with a ledge of rocks near the track where his body was found; also his coupling-stick, and the one wound on his right side, were consistent with the theory of such contact, it was held that a peremptory instruction for the defendant was proper. That there was nothing definite as to whether he met death in this manner or by stumbling and falling. The manner of death is mere speculation.¹

1677. Where the body of a brakeman was found on the track, having been run over by the cars, and a part of his clothing was found upon a brake at the rear of the train, and it was contended that the inference to be drawn was that his fall from the car was caused by the parting of the train, it appearing, however, that the cars, when the train parted, were without brakes, it was held that there was no evidence as to the manner of his death.²

1678. Where there is an entire absence of evidence as to what an employee, whose injuries resulted in death, was doing at the time of the accident, it is not enough to show that one conjecture in regard thereto is more probable than another, as there must be some evidence to show that he was in the exercise of due care, in order to justify a recovery.³

1679. Where the cause of the injury was the key which held a draw-bar in place falling out of its place, and such keys were fastened ordinarily by a split ring, which was missing after the accident, and it appeared that by the jar of the cars such ring might be caused to break and the key work

¹ *Wintuskis, Adm'x, v. Louisville & N. R. Co. (Ky.)*, 20 So. 819. See, also, *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 955, 9 So. 566; *Ill. Cent. R. Co. v. Cathey*, 70 Miss. 332, 12 So. 253.

² *Tuck v. Louisville & N. R. Co.*, 98 Ala. 150, 12 So. 168. See, also,

Short v. New Orleans & N. E. R. Co., 69 Miss. 848, 13 So. 826.

³ *Tyndale v. Old Colony R. Co.*, 156 Mass. 503, 31 N. E. 655.

The rule in Massachusetts is that the burden as to contributory negligence is on the plaintiff.

out, and that the car had run forty miles from its starting place before the accident happened, and that if the ring was out the least jar would cause the key to jump out, and the contention was that a proper inspection would have discovered the absence of the ring, it was held that the absence of the key after the accident being consistent with the exercise of due care by defendant, it afforded no presumption of negligence, or that the key was not properly fastened when the train was made up, and it was error for the court to submit the question to the jury.¹

1680. Where a fireman was injured by jumping from the cab of the engine, which he was forced to do by the engine kicking, that is, the furnace door was blown open and flames forced from the furnace burst into the cab, and there was no certain proof as to what caused this condition, different experts advancing theories as to what might have caused it, some of which, if the cause, would charge negligence upon the servants of the company as would make it liable, it was held there was nothing upon which to base a verdict but mere conjecture, which would not satisfy the demand for affirmative and preponderating proof.²

1681. Where an engineer was injured in a collision with a flat-car which, half an hour previous, had run from a side-track onto the main track, and stopped partly off the track, and various theories were advanced as to what caused the car to run from the siding, but there was no proof, and the jury having found that it was the wind, it was held that, while negligence might be inferred from the circumstances proved, it could not from conjecture, and the verdict was set aside.³

1682. Where an appliance failed to operate, and the cause was unexplained, it was said: Negligence cannot be presumed from the fact of injury, and though it may be in-

¹Kincaid v. Oregon S. L. & U. N. R. Co., 22 Oreg. 35, 29 Pac. 3.
³Hewitt v. Railway Co., 67 Mich. 61.

²Orth v. St. Paul, M. & M. R. Co., 47 Minn. 384, 50 N. W. 363.

ferred from facts proved, it cannot be based upon guesses or conjecture.¹

1683. It was error to permit a party to state what he would have done had he known what did occur was going to occur. What he could have done is apparent to all, but what he would have done is mere conjecture.²

1684. Where an employee was injured by the brake becoming loose under the car, and it was uncertain whether the key which held broke or dropped out, and there was no evidence to determine whether it would have been discovered if the defect existed by ordinary inspection, it was said that the several questions could not be left to the mere conjecture of the jury.³

1685. Where an engineer was found dead in his cab, and it appeared that a box-car had moved on a side-track, close to the main track, with which he might have come in contact, it was held that a nonsuit was proper, as there was no evidence of negligence on the part of the company.⁴

1686. Where a brakeman in some unexplained way fell under the wheels of an engine and was killed, and the plaintiff gave some proof of a want of repair in the track and of a defective step on the engine, it was said, in reversing a verdict for the plaintiff, that the case was submitted to the jury without evidence, and the verdict has no better foundation than a guess, or at most mere probabilities. This will not do.⁵

1688. Where there was no proof as to how a fireman came upon the track, and no proof from which a legitimate inference could be drawn, it was held that no case was made out. It was said: Conjecture cannot be allowed to supersede proof.⁶

¹ *Redmond v. Delta Lumber Co.*,
96 Mich. 545, 55 N. W. 1004.

See *Bailey's Master's Liability*,
pp. 503 to 508, for additional cases
and a discussion of the subject.

² *Rutledge v. Missouri Pac. Co.*,
110 Mo. 312.

³ *Philadelphia & Reading R. Co.*
v. Hughes, 119 Pa. St. 301.

⁴ *Ballard v. New York, etc. R.*
Co., 126 Pa. St. 141.

⁵ *Philadelphia & Reading R. Co.*
v. Schertle, 97 Pa. St. 450.

⁶ *Borden v. D., L. & W. R. Co.*,
131 N. Y. 671.

1689. It was said, in the absence of evidence that the defendant's agent knew of plaintiff's inexperience and ignorance of the dangers connected with a machine, that the jury cannot be permitted, in deciding the question, to rely upon mere inference, conjecture, and their own personal experience.¹

1690. An employee was injured by the breaking of one or two timbers which formed a sort of a bridge over a run. The evidence disclosed no defect in them when put in, and, if sound originally, five years was not sufficient to cause dangerous decay or weakness. It was suggested that the timbers might have become weakened by rock falling upon the bridge. It was said: The mere fact of such injury is no evidence of fault. It may be guessed or surmised that there was negligence somewhere, and one juror may guess that it was in the want of a careful selection of timber, another that it was in the want of subsequent inspection, or in the want of care to prevent rocks falling on the bridge, but the case affords no safe ground for anything beyond conjecture, and if the master can be held liable, under the circumstances, on mere guess or inferences, the rule that an employee assumes the ordinary risks of his employment will be wholly done away with.²

1691. An employee, engaged with others in raising and ballasting a track, was injured by a stone being thrown from a passing train, presumed by its rapid movement, striking him upon the leg, breaking it. There was no proof on the part of the plaintiff tending to show where the stone came from or how and by what means it was put in motion. It was said: The cause of the accident resting on pure conjecture, without evidence tending to explain it or to connect it in any way with any negligence of the appellant, at the close of respondent's evidence, it appeared to be a case of unaccountable misadventure for which no one was responsible.³

¹ *Sherman v. Menomonie Lumber Co.*, 77 Wis. 14.

³ *Steffen v. C. & N. W. R. Co.*, 46 Wis. 259. See *Morrison v. Phillips*

² *Quincy Mining Co. v. Kitts*, 42 Mich. 34.

& *Colby Const. Co.*, 44 Wis. 405.

1692. Plaintiff's intestate, an employee of defendant, was found bruised and dead in a hole which had been cut in the floor of defendant's mill, and in which was water about six feet deep. There was no evidence tending to show how he came into the hole; it rested wholly in conjecture. It was held that a nonsuit was properly ordered. It was said: There are no facts in evidence by which the jury or any one else can form a certain opinion upon the subject so as to clearly determine his negligence. How then can an intelligent verdict be rendered?¹

1693. Where an employee of a steamship company was alleged to have fallen overboard from one of its vessels and drowned, attributable to the negligence of the defendant, and it did not appear from the evidence how or in what manner he was lost from the ship, no one having testified as to having seen him fall or seen him upon the deck, but it did appear that the iron doors of the forward port had been left open by another employee and the opening guarded only by a rope drawn across it, it was said: There is no direct proof as to how deceased met his death. There is nothing to show that he fell through the open port or that his exit from the ship was accidental. It is true a theory may be adopted which would lead to the moral conclusion that his death was accidental while in the discharge of his duties and in the exercise of reasonable care, but all this falls very short of sustaining the burden of proof under which the plaintiff rested.²

1694. A thing cannot be said to be established by circumstantial evidence unless the facts relied upon are of such a nature and are so related to each other that it is the only conclusion that can reasonably be drawn from them, and it is not sufficient that they be consistent merely with that theory.³

¹Sorenson, *Adm'x, v. Menasha Paper & Pulp Co.*, 56 Wis. 338.

³*Carruthers v. C., R. I. & P. R. Co.*, 55 Kan. 600, 40 Pac. 915; *As-*

²*Geoghegan v. Atlas Steamship Co.*, 146 N. Y. 369, 40 N. E. 507. *bach v. Railway Co.*, 74 Iowa, 248.

1695. Evidence that just after a train loaded with gravel started down a grade a brakeman thereon, who had been told by the conductor that the brakes were to be left set till the bottom of the grade was reached, and who so far as it appears had no occasion to go to them till such time, was run over by the train. There was no direct evidence as to the manner of his death. His cap was found at the foot of a tree which stood eighteen inches from the side of the cars on which were the brakes. His body was sixteen feet beyond the tree. A bruise was on that side of his head which would probably have been exposed to the tree, if he had taken hold of the brake to tighten or loosen it. It was held that the evidence was insufficient to submit to the jury the cause of the accident, as this was a mere matter of conjecture.¹

1696. Where a brakeman was killed by falling from a box-car, on the top of which near the brakes was a large hole, and the deceased was last seen alive standing at the brake near this hole, it was held that evidence appeared from which the jury might consider that his death was owing to the hole in the top of the car.²

1697. Where an employee was injured while operating a machine used for shaping iron plates by the "drop," so called, consisting of a long piece of iron, falling unexpectedly on the plaintiff's hand, it was said: It was not essential to a recovery that the employee should be able to show the precise nature of the defect, if it is made to appear that the accident occurred by reason of some defective condition of the machinery, chargeable to the negligence of the employer. (What the defects were, referred to in the opinion, does not appear.)³

1698. It was held proper for the jury to determine whether the cars left the track by reason of their defective condition, though it appeared there was a broken axle which would

¹ *Manning v. Chicago & W. M. R. Co.* (Mich.), 63 N. W. 312.

³ *Nelson v. St. Paul Plow Works*, 57 Minn. 43, 58 N. W. 868.

² *Bromly v. Birmingham M. R. Co.*, 95 Ala. 397, 11 So. 341.

have produced the wreck. It was said: There was evidence tending to show that the axle was broken by the speed of the train over the rough road.¹

1699. The instinct of self-preservation, planted in all persons, may, in a proper case, be allowed some weight as raising an inference of care on the part of the person incurring danger; but if the direct evidence shows care, or want of it, there is no room for a mere inference.²

J. Custom and Use.

1700. The rules and customs which govern the running of railway trains are not matters of common knowledge, but are proper subjects of proof to determine the question of negligence.³

1701. Upon the question of reasonable care the employer is entitled to show that the appliance was put up or act done in the usual way. Such evidence is not conclusive, but it is proper for the consideration of the jury.⁴

1702. Though evidence of usage is not admissible to relieve a party from his express stipulation, or to vary a contract certain in its terms, it has a legitimate office in aiding to interpret the intentions of parties to a contract, the character of which is to be ascertained from general implications and presumptions. Hence it was held that an employer was entitled to show that an appliance, or a part thereof, was arranged in the manner usual.⁵

1703. Evidence as to the kind of machinery used elsewhere, and which might have been used by the defendant, is admissible as bearing on the question of due care.⁶

1703a. Evidence is admissible to show that the method used in fastening belts was the usual and ordinary method,

¹Swadley v. Missouri Pacific R. Co., 118 Mo. 268.

⁴Burns v. Sennett & Miller, 99 Cal. 363.

²Dunlavy v. C., R. I. & P. R. Co., 66 Iowa, 435.

⁵Burns v. Sennett & Miller, 99 Cal. 363.

³Kansas City, M. & B. R. Co. v. Webb, 97 Ala. 157, 11 So. 888.

⁶Wheeler v. Manufacturing Co., 135 Mass. 294; Myers v. Hudson Iron Co., 150 Mass. 125, 22 N. E. 631.

but it is improper to permit the plaintiff to show that other fastenings could have been used without proof that they were in common use.¹

1703b. It was held proper to show by a witness that if guard-rails were properly blocked the foot of an employee could not be caught between the rails, and also that it would be impossible for his foot to be caught in the kind of blocking used by defendant, as showing the particular blocking was out of repair.²

1703c. The duty of the master to provide suitable and proper appliances is to be determined by their actual condition and not by comparison with other appliances used by other establishments for similar work.³

1704. Where evidence was admitted to the effect that a contrivance in other collieries was entirely free from the arrangement which constituted the dangerous character of the one in use at the defendant's colliery, as bearing upon the question of the generality of the use of appliances, and the court charged that, if the jury found that the method used was in use by people engaged in the business, defendants were not guilty of negligence in using it, it was held that such instruction was proper.⁴

1705. Evidence of the custom in other factories as to boxing machinery was held to be immaterial.⁵

1706. Evidence of the usage of builders as to the guarding the openings in floors of buildings in process of construction was held to be competent upon the question of whether an experienced carpenter, injured by falling through such an opening, was in the exercise of proper care.⁶

1706a. Testimony of witnesses as to what is the custom in other places with reference to guarding trenches which

¹ *McCarthy v. Boston Duck Co.*, 165 Mass. 165.

² *Paine v. Eastern R. Co. of Minnesota*, 91 Wis. 340.

³ *Wood v. Heiges (Md.)*, 34 Atl. 872.

⁴ *Kehler v. Schwenck*, 151 Pa. St. 505.

⁵ *Rooney v. Newell, etc. Cordage Co.*, 161 Mass. 153.

⁶ *Murphy v. Greeley*, 146 Mass. 196.

were open under horse-car tracks was held to have been rightly excluded. Reference is made to *Bailey v. New Haven & Northampton Co.*, 107 Mass. 496, and *Hinckley v. Barnstable*, 109 Mass. 126, as sustaining the ruling of the court. In the former case it was held that an expert cannot be asked what is the custom of railroads in maintaining a flagman at crossings similar to the one there in question, or at crossings where there is one track, on the ground that what was sought to be proved was not properly a custom by which parties dealing together are bound, and which, when proved, tends to establish their rights as against each other, but was rather of a practice of railroad companies as to using or omitting a certain precautionary measure at certain crossings. The need of a flagman at a particular crossing depends upon its situation and circumstances. The practice at each crossing would therefore raise a collateral issue. In the latter case it was held that evidence that it was usual for towns in the county to leave drains uncovered was inadmissible in the absence of evidence that the plaintiff knew of such practice.¹

1706b. Where the question to a witness was whether a cut was constructed as cuts were ordinarily constructed on roads running through such places, it was held that it was rightly excluded, for the reason that railroad cuts are not made upon any recognized pattern, and the testimony offered would have been no aid to the jury without further testimony showing that the surroundings of other cuts were substantially similar to those of the cut where the accident happened, which would have involved collateral issues tending to confuse and mislead.²

1707. Evidence that an appliance or machine, not obviously dangerous, has been in daily use for a long time, and has uniformly proved adequate, safe and convenient, is not only admissible, but, where it is not controverted, is suffi-

¹Craven v. Mayers, 165 Mass. 271.

²Union Pacific Railroad Co. v. O'Brien, 161 U. S. 451.

cient to justify a continuance of its use without the imputation of imprudence or carelessness.¹

1708. The Massachusetts court do not adopt the foregoing rule to its full extent. Such evidence is admissible and is entitled to great weight, but is not conclusive.²

1709. Evidence is competent to show that it was a universal custom of other railroads throughout the northwest to use partially worn rails for side-tracks. This upon the question of the care exercised.³

1710. Proof of a general custom to run irregular or special trains, not running on schedule time, is competent as affecting the question whether it is negligence so to operate them.⁴

1711. Where it appears that the use of an engine with a sloping tank is safer than one having a square tank, evidence that a company used one with a sloping tank in one of its own yards is admissible as indicating it had knowledge of that fact.⁵

1712. The usual custom of making couplings on a certain kind of engines, where not confined to the custom of the particular road or at the particular place, where the custom sought to be proven is obviously dangerous, and it did not appear the defendant had adopted such custom, cannot be shown to excuse contributory negligence.⁶

1713. Evidence of what a witness knew from his experience on various roads, concerning the general custom as to a brakeman's duties in obeying the orders of his conductor, is admissible, where it does not appear that the printed rules furnished to defendant's brakemen contained any rule on this subject.⁷

¹ *Stringham v. Hilton*, 111 N. Y. 188; *Lafflin v. Railway Co.*, 106 N. Y. 136; *Burke v. Witherbee*, 98 N. Y. 562.

² *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631.

³ *Doyle v. St. P., M. & M. R. Co.*, 42 Minn. 82, 43 N. W. 787.

⁴ *Larson v. St. P., M. & M. R. Co.*, 43 Minn. 423, 45 N. W. 722.

⁵ *Missouri Pacific R. Co. v. Lehmberg*, 75 Tex. 61, 12 S. W. 828; *Missouri Pacific R. Co. v. Lamotte*, 76 Tex. 219, 13 S. W. 194.

⁶ *Mayfield v. Savannah, G. & N. O. R. Co.*, 87 Ga. 374, 13 S. E. 459.

⁷ *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa, 509, 43 N. W. 303.

1714. It was said: No usage to employ boys of tender years to perform duties involving the personal safety of others, and which requires the exercise of a good degree of judgment and discretion, and constant care and watchfulness, will justify such employment, unless the boy is in fact competent to perform such duties.¹

1715. It was said that while the custom of running switch-engines at an illegal and dangerous rate of speed is no defense, it is quite apparent that if the deceased knew that the engines in the yard were constantly operated at such rate of speed, and chose without objection to remain in his employment, it was entirely competent to prove the fact as bearing upon the extent of the risk the deceased voluntarily assumed.²

1716. It was held competent to show that there was no other awning on the road like the one which caused injury to an employee by brushing him from the train while the train was running by it.³

1717. An offer to prove that in jumping off the train at the time of the injury the employee was only doing what was ordinarily done by defendant's employees engaged in like employment and under similar circumstances, with the knowledge and approval of defendant's officers, was held to have been properly refused, as being an offer to show habitual carelessness and recklessness, which would not render the defendant liable. It was said, however, that it was not understood that this offer was to show that brakemen jumped on and off when the train was moving only at a "fast walk," but included that they did so without looking or being able to look where they would alight or what obstructions they would meet.⁴

1719. Evidence as to a custom of getting on and off foot-boards of moving engines while switching in yards other

¹Molaske v. Ohio Coal Co., 86 Wis. 220.

²Abbot et al. v. McCadden, 81 Wis. 563.

³Nugent v. Boston & C. M. R. Corp., 80 Me. 62, 12 Atl. 797.

⁴Thompson v. Boston & Maine R. Co., 153 Mass. 391, 26 N. E. 1070.

than defendant's was held to have been admissible as bearing on the question of the negligence of the engineer employed.¹

1720. Where it is within the duty or scope of the employment of a servant to perform a particular and somewhat dangerous service, evidence of the usual way in which a like service was done by a fellow-servant is competent in his behalf to show that in performing the service on a particular occasion he was in the exercise of due care.²

1721. It was held not competent for the defendant to prove that its servants usually rang the bell at a crossing, and to ask the jury to infer therefrom that it was rung at the time of the accident. Neither is it competent for the plaintiff to prove that the defendant's servants often, or usually, omitted to ring the bell at such crossing, and to ask the jury to infer that the bell was not rung at the time of the accident.³

1722. It was held, where an employee was injured by a hole in a dock, that evidence as to how the dock compared with others used for a like purpose was inadmissible.⁴

1722a. Where coal was heaped upon a tender and an employee on the track was injured by a lump falling and rebounding, striking him, it was held that negligence could not be predicated upon the fact that the coal was thus loaded, where it appeared that such manner was usual and customary.⁵

1723. Where an employee was injured by the sudden stopping of a gravel train on which he was at work, it was held error to refuse defendant's offer to show by the engineer the manner in which the train was operated for some time prior to, and on, the day of the injury, for the purpose of

¹ *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205.

² *Daley v. American Printing Co.*, 152 Mass. 581.

³ *Tuttle v. Fitchburg R. Co.*, 152 Mass. 42.

⁴ *Propsom v. Leatham et al.*, 80 Wis. 608.

⁵ *Atchison, T. & S. F. R. Co. v. Croll* (Kan. App.), 45 Pac. 112.

showing that plaintiff was familiar with the movements thereof.¹

1724. Evidence that a railroad company ordinarily keeps its track in good condition is not admissible.²

K. Defects at Other Places and in Other Appliances.

1725. Where the negligence charged as the cause of injury was in permitting a track to be and remain out of repair, in that there was a broken rail and an imperfect switch at or near the place of the accident, it was held error to admit evidence of other defects at other places in the road where it was not shown that they had any connection with the accident.³

1726. Where it was alleged that a wreck was caused by a defective track, evidence tending to show the condition of the road-bed and track immediately before and at the time of the wreck, at places other than where the wreck occurred, is admissible. This ruling is based upon *Railroad Co. v. De Milling*, 60 Tex. 195.⁴

1727. Where a defendant has shown the care, inspection and condition of a machine causing the accident, it is proper to exclude evidence as to the care used with respect to other machines.⁵

1728. Where an employee was injured while at work on a dock, caused by reason of a defect therein, it was held evidence was admissible showing that the dock was defective at many places by reason of holes other than the one which caused the injury to the plaintiff.⁶

¹Lake Shore & M. S. R. Co. v. Malcom (Ind. App.), 40 N. E. 822.

³Morse v. Minneapolis & St. L. R. Co., 30 Minn. 465, 16 N. W. 358.

²Fort Worth & D. C. R. Co. v. Thompson, 2 Tex. App. 170, 21 S. W. 137.

⁴Taylor, B. & H. R. Co. v. Taylor, 79 Tex. 104, 14 S. W. 918.

⁵Houston v. Brush et al., 66 Vt. 331, 29 Atl. 380.

⁶Propsom v. Leatham et al., 80 Wis. 608.

1729. Where it was charged that the roughness of the road-bed was one of the contributing causes of the accident, it was held proper for the plaintiff to prove that any part of the road on which the train had run on the trip in question was rough and uneven, but that it was not proper to prove the general condition of the road in other respects or other localities.¹

L. *Declarations of Employees — Res Gestæ.*

1730. A statement by another employee, after the injury, who was superior to plaintiff, in effect that it was the plaintiff's duty to examine the cars as he was doing, is inadmissible, being only hearsay.²

1731. A report made by the plaintiff to the employer, in compliance with the rule, as to how his injuries were received, and his letters making claim for damages, are inadmissible in evidence in his own behalf.³

1732. The fact that a rope which was being used broke was held to be *prima facie* evidence of negligence on the part of the employer. Yet an instruction that the burden shifted upon the defendant to show by a clear preponderance that he used proper diligence to ascertain defects in the rope was held improper. The jury should have been told that it was incumbent upon the defendant to explain.⁴

1733. Where it was charged that the death of an engineer was caused by defects in the track, and to sustain such charge it was sought to prove what the section foreman had said about its condition at a time other than the happening of the accident, it was held that such evidence was incompetent; that it was not a part of the *res gestæ*; that it was not admissible as the expression of an opinion, nor that he

¹ *Haley v. Jump River Lumber Co.*, 81 Wis. 412.

For a discussion of the rule and additional cases, see *Bailey's Master's Liabilities*, p. 518 et seq.

² *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. 452.

³ *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. 452.

⁴ *Puget Sound Iron Co. v. Lawrence*, 3 Wash. Ter. 226, 14 Pac. 869.

had notice, for he could not bind his principal by admissions. Notice to him should have been proved by calling him as a witness, or some one who gave it to him or heard it given to him.¹

1734. The declarations of an engineer at the time of an accident, upon the spot, were held a part of the *res gestæ*.²

1735. Where an agent in charge of the work, at the moment of the accident, declared that he expected it, it was held that evidence of such declaration is admissible as a part of the *res gestæ* upon the question of defendant's knowledge of the condition of the appliance or unsafe condition of the place.³

1736. The question whether witness heard any expression from one claimed to be a vice-principal, at the time of the accident or immediately thereafter, concerning the condition of an appliance, was held proper as a part of the *res gestæ*.⁴

1737. It seems that evidence of the voluntary exclamations which are natural concomitants and manifestations of pain and suffering are still admissible where they form a part of the *res gestæ*, but complaints made which are so far detached from the occurrence as to admit of deliberate design, and of their being a part of a calculating policy on the part of the person injured, cannot properly be regarded as a part of the *res gestæ*.⁵

1738. It was held that a statement made by an injured employee some time after the accident and before his death was not competent to be given in evidence.⁶

1739. In an action brought by the father as administrator, where his son was killed while in the employ of the defendant, it was held that the declarations of the deceased to a co-employee as to the cause of the injury, made a few minutes

¹ Worden, Adm'r, v. Humeston & S. R. Co., 72 Iowa, 201.

² Hannover R. Co. v. Coyle, 55 Pa. St. 396.

³ Elledge v. National City & Otay R. Co., 100 Cal. 282.

⁴ Mullan v. Phil. etc. Steamship Co., 78 Pa. St. 25.

⁵ Kennedy v. R. C. & B. R. Co., 130 N. Y. 654.

⁶ Lendberg v. Brotherton Iron M. Co., 75 Mich. 84, 42 N. W. 675.

after it occurred, in a room adjoining the scene of the accident, was competent as a part of the *res gestæ*, and the rejection of proof of such declaration was reversible error.¹

M. *Experts — Opinions — Conclusions.*

1740. It is settled that whether any particular act of a plaintiff or defendant was negligence, or whether due care required a particular thing to be done, are not matters of expert testimony. They are matters of judgment and common experience, to be determined by jurors upon the facts and circumstances of the case. This was said where an expert was asked if particular acts stated were a sufficient precaution in his experience in the particular mine.²

1741. An expert is one who by practice or observation has become experienced in any science, art or trade.³

1742. The opinion of an expert who neither knows nor can know more about the subject-matter than the jury, and who must draw his deductions from the facts already in the possession of the jury, is not admissible.⁴

1743. It was held that a brakeman who has for five years observed the make-up of freight trains in a depot yard was a competent witness as to the respective duties of the conductor of the train, and other servants of the company, in making up the train and moving it off.⁵

1744. A witness having sufficient knowledge may testify as to the general practice of railroads in coupling cars, and the comparative safety of different methods, but is not competent to show that the different method of another road is better than that of defendant. It is supposed that in such matters even the skilful and experienced will frequently

¹ *Christianson v. Pioneer Furniture Co. (Wis.)*, 66 N. W. 699.

³ *Turner v. Haar*, 114 Mo. 335.

For a collection of cases involving the question of *res gestæ*, see 16 *Pacific Reporter*, note on p. 721.

⁴ *Lineoska v. Susquehanna Coal Co.*, 157 Pa. St. 153.

⁵ *Price v. Richmond, etc. R. Co.*, 38 S. C. 199.

² *Bergquist v. Chandler Iron Co.*, 49 Minn. 511, 52 N. W. 136.

differ in the choice of instrumentalities. A party should not be judged negligent for not conforming to some other method believed by some to be less perilous.¹

1744a. It was held proper to permit a witness having experience to testify as to the dangers that were incident to the use of a machine, what precautions were necessary to avoid them, that the men usually employed about them were adults, and that before being set to work such men were carefully instructed in their use, where the fact was that an inexperienced lad was set to work upon such a machine.²

1744b. It is not proper to show, in an action by an employee for injuries sustained in coupling cars, that brakemen frequently get their hands injured while so engaged.³

1745. It was held error to refuse to permit an expert witness to give his opinion and reasons therefor as to the merits or demerits of whipping straps as signals to brakemen, and to state whether or not they were generally used on roads regarded as well managed. It was proper to exclude his opinion as to whether the defendant's road, or a section thereof, was prudently managed.⁴

1746. Witnesses who have been intrusted with the duty of keeping the track in proper condition, and have had several years' experience in railroading, are competent to testify that such track was not properly constructed.⁵

1747. Where there was evidence that an elevator had been put up by inexperienced and incompetent hands; that it had no safety rope or appliances, and that it had been repaired by defendant's employees, it was held that it was competent for plaintiff to introduce the testimony of an experienced elevator builder to show that the elevator with-

¹ Propst v. Georgia Pacific R. Co., 83 Ala. 518; Georgia Pacific R. Co. v. Propst, 3 So. 764.

² New York Biscuit Co. v. Rouss, 74 Fed. 608.

³ Cincinnati, N. O. & T. P. R. Co. v. Lewallen (Ky.), 32 S. W. 958.

⁴ Louisville & N. R. Co. v. Hall, 87 Ala. 708, 6 So. 277.

⁵ Ft. Worth & D. C. R. Co. v. Wilson (Tex. App.), 24 S. W. 686.

out safety appliances was unsafe, and that an ordinary carpenter or machinist without any special knowledge of elevators would not be a fit person to construct, repair or put up an elevator.¹

1748. Where the negligence charged was the defective manner in which a wheel in a tackle-block was held in place; a witness cannot state his opinion that the wheel was properly secured in the block in suitable repair, as these are questions for the jury.²

1749. An expert railroad man cannot be asked whether, in his opinion, inspectors would have discovered the defects, which consisted in the rottenness of the wood on a car at a place where a ladder was attached, if the car had been examined.³

1750. It was held improper to ask a witness, as an expert, whether a proper inspection would have discovered an obvious defect in a car.⁴

1751. It is improper to permit witnesses to testify whether an employee injured was a careful or careless man in guarding himself and employees from dangers.⁵

1752. In an action against a railroad company to recover damages for negligence resulting in the death of a locomotive engineer in its employ, it was held that a fireman was not a competent witness to testify, as an expert, as to the necessity of a safety-switch at the place of injury.⁶

1753. It is competent for railroad men to show their experience as such, and to testify that switches were blocked before and after the accident in railroad yards where they worked.⁷

1754. A witness cannot be asked on cross-examination whether it is negligent for a person, who has business to at-

¹ *Bier v. Standard Mfg. Co.*, 130 Pa. St. 446.

² *Houston v. Brush et al.*, 66 Vt. 331, 29 Atl. 380.

³ *Allen v. Union Pacific R. Co.*, 7 Utah, 239, 26 Pac. 297.

⁴ *Gutridge v. Mo. Pac. R. Co.*, 94 Mo. 468.

⁵ *Elliott v. C., M. & St. P. R. Co.*, 5 Dak. 523, 41 N. W. 758.

⁶ *Ballard v. New York, etc. R. Co.*, 126 Pa. St. 141.

⁷ *Hamilton v. Rich Hill Min. Co.*, 108 Mo. 364, 18 S. W. 977.

tend to on a railroad track, to be standing on the rails immediately in front of a moving car, since it is for the jury to say whether such fact constitutes negligence.¹

1755. It is incompetent for a plaintiff, where called as an expert witness in his own behalf, to give an opinion upon the propriety of his conduct at the time of the injury.²

1756. What the servant's belief or understanding was, as to the protection he could receive while performing his duty, is immaterial. The facts only are important.³

1757. The question, "If the engineer had paid attention to the signals that were given him, and stopped the train, would this man have been killed?" is objectionable as calling for his opinion, where the facts on which the opinion is based were the proper objects of inquiry, the conclusion to be drawn from such facts being for the jury and not for the witness.⁴

1758. It was held competent for defendant to ask a witness, who was on a hand-car with deceased at the time the latter was injured by being run down by a train, and where the witness had testified to all the facts, whether the deceased had ample time to jump from the hand-car before the collision.⁵

1759. It was held not error to admit the testimony of an elevator builder that he would regard as unsafe an elevator, running with a five-eighths rope, used to transport iron weighing a ton, and passengers also, without a safety rope and other safety appliances.⁶

1760. The testimony of witnesses who were experienced in the particular work, that in their opinion it was absolutely necessary for the plaintiff to assume the position he

¹ *Hamilton v. Rich Hill Min. Co.*, 108 Mo. 364, 18 S. W. 977.

² *Hudson v. Georgia Pac. R. Co.*, 85 Ga. 203, 11 S. E. 605; *Mayfield v. Savannah, G. & N. S. R. Co.*, 87 Ga. 374, 14 S. E. 459.

³ *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. 452.

⁴ *Kendrick v. Central R. & B. Co.*, 89 Ga. 782, 15 S. E. 685.

⁵ *Quinn v. New York, N. H. & H. R. Co.*, 56 Conn. 44, 12 Atl. 97.

⁶ *Bier v. Standard Mfg. Co.*, 130 Pa. St. 446.

did in order to do the work, and that he had neither the size nor the strength to do it otherwise, was held to have been properly admitted. It was said it was not mere opinion, but a statement of knowledge of what had to be done.¹

1761. It was held that an expert might properly testify that a dump-car might be in perfectly good order and still fly back by reason of the fault of those who dumped it; that he had seen it done. The latter statement served to show more clearly the value and weight of his opinion.²

1762. It was held that a non-expert witness, after narrating the facts, might state his opinion based upon such facts as to the health and mental condition of an employee who had sustained an injury.³

N. Laws of Other States — Lex Fori — Lex Loci.

1763. What the common law of a particular state is must be proved as a fact, but courts take judicial notice of the common law of their own state. The presumption is, in the absence of proof to the contrary, that the common law of a particular state is the same as that of the state where the court is sitting.⁴

1764. The law of any particular state is a fact to be determined by a jury.⁵

1765. In such case it becomes the duty of the court, as in the case of any other documentary evidence, regarding construction, to construe the decisions; the rulings of the trial court in this respect being subject to review by other courts having jurisdiction in error, thus securing as much certainty in ascertaining the law of another state or country as the nature of the subject will admit.⁶

¹ *Kehler v. Schwenck*, 151 Pa. St. 505.

² *Donahoe v. New York, etc. R. Co.*, 159 Mass. 125. See, also, *Commonwealth v. Leach*, 156 Mass. 99.

³ *Price v. Richmond, etc. R. Co.*, 38 S. C. 199.

See *Bailey's Master's Liability*, p. 531, for other illustrations.

⁴ *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 11 Pac. 408.

⁵ *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623; *Ingraham v. Hart*, 11 Ohio, 255; *Bank v. Baker*, 15 Ohio St. 68; *Williams v. Finley*, 40 Ohio St. 342.

⁶ *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623; *Cobb v. Griffith &*

1766. Where, in an action prosecuted in one state by a servant against his master to recover for personal injuries resulting to him from the negligence of another servant of the same master, it appears that the accident causing the injury occurred in another state, that the contract of employment was made in that state, and that all the stipulated services were to be performed therein, no recovery can be had if by the law of such latter state no right of action arose from the transaction, though the laws of the state where action is brought would give full relief had the accident occurred in such state.¹

1767. If by the law of another state, where a personal injury is suffered, a recovery may be had there, an action may be maintained in Massachusetts, although the plaintiff could not recover if the injury had happened in Massachusetts.²

1768. The right of action for damages given by a statute of one state may be asserted in the courts of Mississippi because of the coincidence of that statute with that of Mississippi, and also because the right of action of a transitory nature, created by the statute of another state, may be enforced in Mississippi, if not in conflict with the public policy of such latter state.³

1769. It was said, however, that it has been the settled law in this state that an action will not lie by a servant against his master for injuries received in the course of his service through the negligence of a fellow-employee. Where such injury was received in another state, whose statute grants a right of action in such cases, no action will lie therefor here; the remedy in personal actions for personal injuries being governed by the *lex fori*.⁴

Adams Co., 87 Mo. 90; Kline v. Baker, 99 Mass. 253.

¹ Alexander v. Pennsylvania Co., 48 Ohio St. 623.

² Walsh v. N. Y. & N. E. R. Co., 160 Mass. 571.

³ Chicago, etc. R. Co. v. Doyle, 60 Miss. 977.

⁴ Anderson v. M. & St. P. R. Co., 37 Wis. 321, citing Pearsall v. Dwight, 2 Mass. 84; Scoville v. Canfield, 14 Johns. 338; Lemon v. People, 20 N. Y. 562.

O. *Models, Plats and Diagrams.*

1770. Where a model was used by a witness to illustrate how a scaffold was constructed, and there was testimony to the effect that it was a correct model, but this was disputed, and though not formally introduced in evidence the jury were allowed to take it to their room, it was said: The model became a necessary part of the testimony of the witness, to go to the jury as such. It was not used as independent testimony of the witness. It would be like a pencil drawing, made by the witness on the stand and in the presence of the jury, to illustrate and explain his oral evidence. The use of the model in this way was proper.¹

1771. A model or drawing may be made by a party to a suit to illustrate any article of machinery involved in the issue on trial, without notice to the opposite party; but whether such model is properly proved to be such was said to be another question.²

1772. A diagram illustrating the scene is admissible after having been proved to be correct by witnesses.³

1773. If a photograph is a correct delineation of the scene it is competent evidence, upon the ground that the jury, if possible for them to do so, would be permitted to view the same for the purpose of more readily applying and understanding the evidence.⁴

1774. Where the action was against a town to recover for injuries caused by a defect in the highway, it was held that a photograph of the place was admissible in evidence, if verified by proof that it is a true representation, to assist the jury in understanding the case; and whether it is sufficiently verified is a preliminary question of fact to be decided by the judge presiding at the trial, and his decision thereon is not subject to exception.⁵

¹Blazinski v. Perkins, 77 Wis. 9.

⁵Blair v. Pelham, 118 Mass. 420;

²Augusta & S. R. Co. v. Dorsey, 68 Ga. 228.

Commonwealth v. Coe, 115 Mass. 481; Walker v. Curtis, 116 Mass. 98;

³Moon v. State, 68 Ga. 688.

Turner v. Boston & M. R. Co., 158

⁴Locke v. S. C. & P. R. Co., 46 Mass. 261.

Iowa, 109.

1775. A plan or picture, whether made by the hand of man or by photography, is admissible in evidence, if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case.¹

P. Mental Suffering.

1776. Where a plaintiff was asked the question: What was and is now the condition of your mind as affected by and in relation to your injury? and he answered: "I have always since the injury had feelings of fear regarding the future of my wife and family," while conceding that mental suffering is a proper element for consideration in determining the extent of damages, yet it was said that mental suffering arising from apprehension as to the future of one's family is not a natural result of the injury, but depends upon the pecuniary condition and social relation of the sufferer.²

Q. Positive and Negative Testimony.

1777. Where the plaintiff testified that he was not sure whether he was caught in the belt or not, where the negligence charged was that such belt was uncovered, and none of his witnesses saw the accident, and a witness for the defendant testified that he saw the accident, and showed that the belt had nothing to do with it, it was held that a verdict should have been directed for the defendant.³

1778. Where defendant and his wife testified unequivocally as to giving positive orders to a servant to do certain acts, and the plaintiff failed to deny this in express terms, but stated he did not remember having been at the defendant's house on that occasion or that such orders were given him, it was held that a verdict for the plaintiff could not be sustained.⁴

¹ Marcy v. Barnes, 16 Gray, 161; ² Texas Mexican R. Co. v. Douglass, 69 Tex. 694, 7 S. W. 77.
Hollenbeck v. Rowley, 8 Allen, 473;
Ruloff v. People, 45 N. Y. 213; ³ Ford v. Anderson et al., 139 Pa. St. 265, 21 Atl. 18.
Underzook v. Commonwealth, 76 Pa. St. 340; Church v. Milwaukee, 31 Wis. 512; Dyson v. N. Y. & N. E. R. Co., 57 Conn. 9. ⁴ Covell v. Harvey (Miss.), 12 So. 462.

1779. Where a woman stepped upon the track in front of a locomotive, and her statement was that she looked and listened and did not hear signals, and six witnesses testified to the fact that signals were given, it was held that her statement was not sufficient to raise a conflict.¹

1780. Where the only testimony to the effect that signals were not given was that of the plaintiff, who was a section-hand, injured in a collision of his car with a freight train, that he did not hear any signals of approach of the train, and it did not appear what the conditions were surrounding him at the time, and there was positive testimony by a number of witnesses that signals were given, it was held that a verdict for the plaintiff could not be sustained. It was said: There are cases in which negative testimony might in the face of positive testimony sustain a verdict; but in such cases not only must the comparative credulity of the witnesses be placed in the balance, but there must be something by which means of knowledge can be weighed. Where such testimony is relied upon for a verdict, it devolves upon the party introducing it to show that he was where he would probably have heard the bell had it been rung or the whistle had it been sounded.²

1781. Where the issue is as to the making of a noise, such as the ringing of a bell, the testimony of a witness that he did not hear it is of itself, as against positive testimony that it was rung, no evidence that it did not ring, but taken in connection with evidence showing that he could and probably would have heard it had it rung, it is evidence to go to the jury that it did not ring.³

1782. The testimony of witnesses who testify positively to the giving of signals is entitled to the greater weight; yet the testimony of witnesses who were in a position which

¹ *Hauser v. Central R. Co. of New Jersey*, 147 Pa. St. 443.

² *International & D. N. R. Co. v. Arias* (Tex. App.), 30 S. W. 446.

³ *Moran v. Eastern R. Co. of M.*, 48 Minn. 46, 50 N. W. 930; *Menard v. Boston & Maine R. Co.*, 150 Mass. 386, 23 N. E. 214.

should have caused them to listen, in effect that they did not hear signals given, raises a conflict.¹

1783. In the cases cited in note below the doctrine is discussed.²

R. Reputation.

1784. Proof of general notoriety is generally admissible as tending to prove notice of a fact where such notice is a material inquiry; but it is never competent to prove the fact itself. This must be shown by other testimony. This rule was applied, and it was held not competent to show that the bridge in question had before been the means of killing another person, as tending to show the dangerous character of the bridge.³

1785. It seems the court held that such notoriety of the dangerous character of the bridge, coupled with the positive evidence of the happening of prior injuries, is proper to be shown upon the question of notice on the part of the company.⁴

1786. Evidence that the general impression among the men working in a shop was that a certain person was master mechanic on a certain date is not admissible to prove such fact, but it is competent for such men to testify as to their recollections of the time when such a person commenced to act as master mechanic, it being an admitted fact that he was master mechanic from and after a certain date; also any acts or parts of acts conducing to prove such person was acting in such capacity, with the knowledge and consent of the defendant, was admissible.⁵

¹ Hanlon v. Missouri Pac. R. Co., Hun, 495; Hoffman v. Railroad Co., 67 Hun, 581; Kansas City, etc. R. Co. v. Lane, 33 Kan. 702.

² Bohan v. Railroad Co., 61 Wis. 391; Ohio & M. R. Co. v. Reed, 40 Ill. App. 47; Hauser v. Railroad Co., 147 Pa. St. 440; Horn v. Baltimore & Ohio R. Co., 54 Fed. 301; Cuthane v. Railroad Co., 60 N. Y. 133; Rooney v. Railroad Co., 68

³ Louisville & N. R. Co. v. Hall, 87 Ala. 768, 6 So. 277.

⁴ Louisville & N. R. Co. v. Hall, 91 Ala. 112, 8 So. 371.

⁵ Texas Mexican R. Co. v. Douglass, 69 Tex. 694, 7 S. W. 77.

S. *Scintilla*.

1787. It was said the day is past for allowing or sustaining verdicts upon a mere *scintilla*.¹

1788. The burden lies upon the plaintiff to prove the negligence which he alleges; and while it is true that this may be done by proof of facts from which it may reasonably be inferred that the defendant's negligence caused the injury complained of, it is equally true that a mere *scintilla* of evidence is not sufficient. It must be evidence having legal weight and upon which the verdict of a jury would be allowed to stand.²

1789. The judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party bearing the burden of proof, unless the evidence be of such a character that it would warrant the jury in proceeding to find a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.³

T. *Speed of Trains*.

1790. Evidence can be admitted that fast mail trains can run at a rate of sixty miles an hour safely on a well-ballasted track.⁴

1791. The testimony of a witness as to the speed of the trains is competent when it appears that he was a resident of

¹ *Westerberg v. Kinzua Creek & K. R. R. Co.*, 142 Pa. St. 471.

² *Nason v. West*, 78 Me. 253.

³ *Commonwealth v. Clark*, 94 U. S. 278.

The doctrine discussed and cases cited in *Bailey's Master's Liability*, p. 490 et seq.

⁴ *Ft. W. & D. C. R. Co. v. Thompson*, 2 Tex. App. 170, 21 S. W. 137.

the locality, was familiar with the running of trains, and had an opinion as to the speed of those in question.¹

1792. Where excessive speed of the train is alleged as the proximate cause of injury, testimony as to the rate of speed at a place one and one-half miles distant from where the accident occurred is admissible. It is not proper for the court to instruct the jury, under the evidence, as a matter of law, that twenty miles, or forty miles, or forty-five miles, per hour, is not negligence. It is a question of fact, properly left to the jury, in view of all the evidence as to the grade and the reverse curves, to determine whether the rate of speed at the time was negligence.²

U. *Variance.*

1793. Where a person charges, in an action for personal injuries, a specific act of negligence as a ground for damages, he is concluded thereby, and cannot recover upon other grounds of negligence not alleged.³

1794. Where the declaration counts only on improper construction of the elevator causing the injury, and its careless use and management, plaintiff cannot recover on the ground that defendant employed incompetent servants.⁴

1795. A complaint must proceed upon a definite theory, and the cause must be tried on the theory constructed by the pleadings, and such a judgment as the theory selected warrants must be rendered, and no other or different one. The cause of action stated in the complaint is the only one upon which a plaintiff is entitled to recover. Hence, where a complaint specifies certain defects in a machine as the cause of injury, the plaintiff cannot, without amendment,

¹ *Pence v. C., R. I. & P. R. Co.*, 79 Iowa, 389, 44 N. W. 686.

² *Louisville & N. R. Co. v. Woods* (Ala.), 17 So. 41.

³ *Telle v. Leavenworth Rapid Transit Co.*, 50 Kan. 455, 31 Pac. 1076; *Atchison, T. & S. F. R. Co. v.*

Irwin, 35 Kan. 286; *Denton v. Railroad Co.*, 52 Iowa, 161; *Carter v. Railway Co.*, 65 Iowa, 287; *Price v. Railway Co.*, 72 Mo. 415.

⁴ *Sell v. Rietz Bros. Lumber Co.*, 70 Mich. 479, 38 N. W. 451.

make proof of other defects, although they make a case. "It would be folly," say the court, "to require the plaintiff to state his cause of action and the defendant to disclose his grounds of defense, if on the trial either or both might abandon such grounds and recover upon others substantially different from those alleged."¹

1795a. Where the complaint alleges certain defects in machinery as the cause of injury, proof cannot be admitted of other defects.²

1795b. Where the complaint specifies certain acts of negligence on the part of a certain employee, proof of other negligence of another employee is improper.³

1795c. Where the *gravamen* of the complaint was injury received from defective appliances, evidence that their use was induced by a promise to repair is not admissible where such promise is not pleaded.⁴

1795d. The alleged negligence being the defective condition of the track, evidence is admissible showing that the collision of the engine with a calf on the track in connection with such condition was the cause of the accident.⁵

1795e. Where the negligence alleged was the failure to guard a wheel and warn the plaintiff of the danger in oiling the machinery, it was not improper to admit evidence tending to show that the light was a considerable distance from the box, the place of injury, and that there was a shadow over the box. The evidence was held admissible as a part of the *res gestæ*, and as a fact properly to be considered in determining whether plaintiff assumed the risk, and whether defendant was negligent in not guarding the wheel and not warning the plaintiff of the danger.⁶

¹ Arcade File Works v. Juteau (Ind.), 40 N. E. 818; Brown v. Will, 103 Ind. 71.

² Conrad v. Gray (Ala.), 19 So. 398.

³ Thomas v. Louisville & N. R. Co. (Ky.), 35 S. W. 910.

⁴ Malm v. Thelin (Neb.), 66 N. W. 650.

⁵ New York, T. & M. R. Co. v. Green (Tex. App.), 36 S. W. 812.

⁶ Kucera v. Merrill Lumber Co., 91 Wis. 637.

